

SUPERFUND REFORM AND REAUTHORIZATION

HEARING
BEFORE THE
COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ONE HUNDRED FIFTH CONGRESS
FIRST SESSION
ON

S. 8

SUPERFUND CLEANUP ACCELERATION ACT OF 1997, AS AMENDED BY
THE PROPOSED SUBSTITUTE AMENDMENT, DATED AUGUST 27, 1997,
SPONSORED BY SENATORS CHAFEE AND SMITH OF NEW HAMPSHIRE

SEPTEMBER 4, 1997

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SUPERFUND REFORM AND REAUTHORIZATION

THURSDAY, SEPTEMBER 4, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m. in room 406, Senate Dirksen Building, Hon. John H. Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Smith, Kempthorne, Bond, Thomas, Allard, Inhofe, Sessions, Baucus, Boxer, Lautenberg, Reid, Graham, Wyden, and Moynihan.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. I want to welcome everyone here this afternoon. This hearing before the full Committee on Environment and Public Works is to consider Superfund legislation.

We are under somewhat of a time constraint today. There have been objections posed by the Democratic leader to our meeting beyond—I believe it's 4:30. So we have a host of excellent witnesses. I want to urge everybody to make their statements crisp and their questions to the point, and the answers, similarly.

Now, Senator Baucus has to introduce a constituent of his State before the Foreign Relations Committee, and he will not be here for a few minutes. I know that Senator Lautenberg had a press conference over in the Cannon Building at 1:45, so he will be a few minutes late. So I will make a brief opening statement, and then ask Senator Smith if he chooses to make a statement, and Senator Kempthorne and others who might be here, and we'll go right to the witnesses.

First I want to thank our witnesses, some of whom have come a considerable distance, and I appreciate that. I am delighted that each of you have lent your energies to these efforts. And, of course, we want to welcome the Administrator of EPA, Administrator Browner, here, once again.

From the beginning of this Congress I have believed that the Senate could pass legislation to reauthorize Superfund this year. By "this year," I mean this calendar year. I still believe it. Today is another important step toward fixing a program which every person in this room has found fault with at one time or another. Our goal is to keep the process moving.

We will be hearing from witnesses today about the revisions to S. 8, which was the bill that Senator Smith and I introduced last

January. The draft changes were released last week. These changes were made in response to testimony we received in hearings, and then we had a series of 11 stakeholder meetings, and subsequent to that negotiations have taken place. This has all occurred over the past 6 months, so it has been a very industrious effort.

What we need to do now, it seems to me, is to keep at it. The President, Administrator Browner, the Senators here today from both sides of the aisle, and our counterparts in the House have all indicated support for reforming the program. Now the players in this, the Senate, the majority, the minority members, and the Administrator must join together to finish the task in the Senate. That's what I'm concentrating on, the Senate; what happens in the House is out of our jurisdiction, clearly, but we can provide leadership in the Senate.

Substantial efforts have been made in past Congresses to do this. All of this work has led us to being, I believe, very close to a finished product.

I would like to thank everyone who has participated in our process during the past 6 months—Senator Smith, who spent so much time on it; Senator Baucus; Senator Lautenberg; Administrator Browner. All your staffs have worked hard with one another and with me and my staff, likewise, so I thank you. I appreciate the time and energy of everyone who has participated in the stakeholder meetings. Those were very well-attended and, I thought, fruitful.

I want to talk briefly about the process we have been through. As I mentioned, since March we have had more than 220 hours of discussion and negotiation that touched on every title of S. 8. After the stakeholder process, we began to negotiate changes to the bill. On some issues, the gaps were narrowed considerably. Those areas where the discussions were most productive are reflected by many of the changes in the new draft. On other sections, clearly, less progress was made.

We still need to address many elements of the bill. I will continue to work toward a bill that most Senators in this committee can support. I will continue to work with Senators to find the best way to keep the process moving. I want to stress the need to keep going. The first session is nearly over, and although we've done a lot, we still have a long way to go to pass a bill.

I want to note briefly some of the areas that, to my mind, underscore the progress that we've made.

The remedy selection title of the bill now says more plainly what I believe was always intended, that remedies must always protect human health and the environment. There's no argument with that.

It accounts for future land use in deciding "how clean is clean" and will result in faster cleanups.

The bill has been made more flexible regarding the Federal-State relationship. States can assume various degrees of responsibility for site cleanups, and the Federal Government can step in if the Governor asks for help, or if the remedies used by the State are not sufficiently protective.

Each of these issues was raised in testimony and discussions about the bill. We have made a great effort to resolve them. It is in that cooperative and productive spirit that I ask my colleagues not to let the hard work of past months go to waste. It is time to finish the bill.

I want to thank you.

Senator CHAFEE. Now, Senator Smith.

**OPENING STATEMENT OF HON. ROBERT SMITH, U.S. SENATOR
FROM THE STATE OF NEW HAMPSHIRE**

Senator SMITH. Thank you very much, Mr. Chairman, and good afternoon, Administrator Browner. It's nice to see you here.

Let me just make a couple of brief remarks and submit a statement for the record in the interest of time.

This, I believe, is the tenth hearing we have had on this issue over the past 3 years, and hopefully this will be the final one before we finally get some action.

Cleaning up toxic waste sites is not an issue for talk; it is one for action I think, as you can see by the interest in the audience here today, as well as those watching—there is a great amount of interest in getting this program fixed. The American people deserve no less.

We've talked long enough. I sincerely hope that as a result of the hearing and discussions between now and the time that we go to markup, that we will be able to resolve our differences.

There have been 200 hours of formally-scheduled discussions with the minority alone this year, either at the Member level or at the staff level, and that's just this year. We've been talking for the past three Congresses, and there is unanimous agreement, I believe, that at the minimum the program should be fixed, and certainly overhauled, and I don't think there's any better time to do it than now.

One of the interesting numbers that we hear in the debate about Superfund is that one out of four Americans lives near one of these toxic waste sites. This is unacceptable. I think there isn't anyone who would disagree with that.

The interesting thing, as far as I am concerned, is that not only is it unacceptable, it is unnecessary. There is no need to have this situation there. We have the technology and the resources to do one of two things: either clean it up, or contain it so that it is not a human health threat. We have the technology and the resources; let me repeat that. But what we have not done is prioritized those resources or applied that technology, for a vast array of reasons.

We have to make sure that the valuable and somewhat limited resources that we have are not wasted on bureaucracy and lawyers and other items that really are not contributing to the cleanup. And that's been the focus of our program reform. It's been the focus of the discussions that we've had. I believe it is the focus of S. 8. We have spent over \$50 billion on this program over the last 17 years. Some would argue about how many sites we've cleaned up, but at the most it's one-third, and that's not good enough. We can do better; we should do better; we must do better. And this bill, although not perfect, will make better, safer, and faster cleanups possible. We move the ball forward.

You will find, as you find in many issues, that everyone is not going to get everything they want. But we have tried very hard—all the individuals that represent every aspect, pro and con, on this issue that I know of, we've had a dialog with. I want to thank those who have participated in that dialog, especially Ms. Browner, with whom we've had a great working relationship over the past 3 years. Even where we disagree, we do it respectfully of each other.

Senator Chafee and I have tried very hard to incorporate a number of the concerns that you have raised, Administrator Browner, and others, into the bill. This, as you know, is not the original S. 8 as introduced; this is an amended S. 8. So we've tried to incorporate a lot of those reforms because we believe that's the way to get a bill and to improve the program.

However, we also know that one of the positions that the Administration has taken, and specifically that Administrator Browner has taken, is that administratively they've made a lot of changes over there, and they have been positive. I have said that publicly and privately to Administrator Browner. We feel that many of the administrative changes that you've made have been positive. However, there is some dispute as to how effective some of these changes are, whether they are being executed or carried out in every community.

But be that as it may, our goal here is to try to reach consensus on a bill that moves the ball down the field. Those of you who have followed the progress of the debate realize how far we've come. We've come a long way since the so-called "Earth Program" of 3 years ago. This bill, where we are now, is the result of hundreds of hours of discussions among staff, stakeholders, and constituents. We have included the concerns of many; some, we have not been able to agree on. But I hope that perhaps between now and the time we mark up, Mr. Chairman, we will be able to reach some accommodation.

Let me just close on this point. If we can't agree on every single specific item—whether it's liability or remedy—I would just make an appeal to my colleagues on the other side of the aisle to let the process work. Let the bill go to the Senate floor and let the Senate work its will. I think that is better and fairer than to kill a bill by not allowing it to go forward to the Senate floor. If it dies because the President vetoes it or because the Senate rejects it, so be it; but let's not let it die simply because we refused to bring it to the floor. We've all worked too hard and too long to see that happen.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Senator Smith.

Senator Kempthorne.

**OPENING STATEMENT OF HON. DIRK KEMPTHORNE,
U.S. SENATOR FROM THE STATE OF IDAHO**

Senator KEMPTHORNE. Mr. Chairman, thank you very much. I want to commend you for holding this hearing. This is critical; it's time for the Nation to deal with Superfund. It is time for the Nation to have results with regard to the Superfund sites. I want to commend you, and I also want to commend Senator Smith. I don't know of a Senator who is more dedicated to getting this resolved

than Senator Smith of New Hampshire, who has worked diligently to try to make this a reality.

I also appreciate that Administrator Browner is here, and I look forward to her comments, as I also do.

May I also acknowledge James Perron, who is the mayor of Elkhart, IN. James and I were mayors together; I appreciate seeing, you, Jim. And also Ben Nelson, who is the Governor of Nebraska, who is very helpful in our efforts to stop these unfunded Federal mandates. I believe he will be testifying today, also.

Mr. Chairman, I would just note that I will be leaving shortly, unfortunately, because I will be chairing with the House—we have a conference going on in the Armed Services Committee on personnel matters, so I will be leaving. I hope to come back so that I can discuss the natural resource damages issue. I think that's a critical one that has a key role to play in this whole legislation.

I am pleased that the bill generally recognizes the need to reform and improve the NRD program, but we need to get to the heart of the fundamental problems with the program. In my opinion, the problem with the current program is that it isn't being used to restore resources, as it was intended to, but instead has become more like a second cleanup program and a second litigation opportunity, and one that can be very expensive and very time-consuming. The State of Idaho now has the largest natural resource damages lawsuit in the country. Together, the Federal Government and the Coeur d'Alene Tribe are asking for over \$2 billion. Only half of that is to actually restore natural resources. The rest is for so-called "compensation for nonuse or lost use" damages. These compensatory damages have nothing to do with the actual restoration of the Coeur d'Alene Basin. Instead, they are used to inflate lawsuit claims, and ultimately drive up the cost of settling a lawsuit.

Litigation on natural resource damages is just beginning, but if we don't do something now, we run the risk of merely shifting the costly litigation and delay from the cleanup program to the natural resource damages program. That's a risk that we simply cannot afford to make if we want to restore damaged natural resources in a timely manner, and that ought to be the goal. Let's restore the resources.

For that reason I strongly support meaningful reform to the natural resource damages program. I want to work with the chairman and the committee to include that reform in this bill.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you.

In order of arrival, while Senator Lautenberg is getting organized—he's the chairman of the subcommittee—do you want to go now, Frank?

Senator LAUTENBERG. That's the nicest thing you've said to me.

[Laughter.]

Senator LAUTENBERG. You just made me chairman of the subcommittee—

[Laughter.]

Senator CHAFEE. All right. Don't get used to it.

[Laughter.]

Senator LAUTENBERG. I like it. I like it.

[Laughter.]

Senator CHAFEE. I'll try not to make it a habit.

**OPENING STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. John is really bipartisan, I must say.

Mr. Chairman, before the summer recess there was a new mood in Congress, one of cooperation. The best example of that spirit was our negotiation on the budget, on the bill where we had daily Member input, worked together in a way of consensus that showed respect for the views of all of our colleagues. By working cooperatively we forged an historic agreement that both balanced the budget and gave tax relief, and that's the way the American people wanted to see us work. That's the way we started this Superfund reauthorization process. Our negotiations during the first part of this year, I thought, yielded positive benefits. And I think we should continue down that same road, Senator Chafee, that you and I traveled together during the budget negotiations when we worked out a bipartisan bill.

Today I offer my personal commitment to work hard and to cooperate with my Republican colleagues to reach a bipartisan Superfund reform. Unfortunately, with what I see here—

Senator CHAFEE. We always have these nice statements, but then there follows "but" or the dropping of the other shoe. You do that so well.

[Laughter.]

Senator LAUTENBERG. One was a reflection of the past, and the other is a contemplation of the present. And I hope that the future will hold out more hope.

Unfortunately, Mr. Chairman, with the partisan markup, it seems to me we're moving toward a different kind of atmosphere. I hope that that will not doom Superfund reform once again. We can't forget the importance of the legislation. Superfund is, first and foremost, a matter of public health. That issue at times seems to have gotten lost in the swirl of litigation and controversy that surrounds Superfund. For instance, data from the Agency for Toxic Substances and Disease Registry shows troubling trends in my home State of New Jersey. The data show that in all but one of 21 counties, cancer rates in areas around hazardous waste sites exceed the national average. Studies from other parts of the country—Idaho, Illinois, Kansas, Missouri, Pennsylvania, California—also suggest that those living near toxic waste sites, particularly children, suffer disproportionately from serious health problems, and the health of our families cannot be a partisan issue. I hope that we don't lose site of that.

I oppose a quick hearing and markup. I reviewed the mark laid down before the committee last Thursday, and while I note that there are some changes and improvements over S.8, overall I am still disappointed. The mark sets us back substantially. On cleanups, by codifying a cancer risk range without a point of departure, the mark would let Superfund cleanups satisfy the law but be 100 times weaker than they are today. By giving only lip service to a preference for treatment, the mark shifts this program from one where poisons are treated to one where poisons are merely fenced off.

On liability, the so-called “co-disposal carve-out” really offer a bail-out for shady polluters, but soaks the taxpayer. Where is the fairness in a scheme that rewards Fortune 100 companies who poison the neighborhood landfill or, worse yet, own the landfill but leaves responsible corporate citizens—who paid more to send their waste to hazardous waste landfills—still on the hook?

On States, I am entirely in favor of dividing the labor between EPA and qualified States, but the mark hands off Federal responsibility. It actually prevents the Feds from stepping in in a way that is unheard of in any other environmental statute in this country, and does not adequately protect the public.

On natural resources damage, by precluding recovery of nonuse of damages, the mark deprives the public of complete compensation for natural resource damages. My colleagues from New York and California and Oregon out to be particularly outraged that the mark seems to undermine their years of litigation efforts.

On small businesses and cities, the mark actually hurts small business and other sympathetic parties who can’t survive the costs of Superfund litigation. By making relief prospective only, and only for NPL sites, the mark does nothing for the municipalities and small businesses who need help right now, those who have been sued by Fortune 100 companies.

Mr. Chairman, all of these problems are solvable, I believe, if we reopen bipartisan negotiations on this crucial legislation. I want to do that; honestly, I do. The American people want us to work together, and it struck me as rather unusual that one of the things that they like best about the budget bill that we finally put to rest was that we worked together. Even some who didn’t like the bill complimented us on the fact that we worked together to get something done.

The health of our families is at stake. I don’t have to remind everyone here that I think we’re duty-bound to honor the wishes of the American people, and I hope we will be able to do that.

[The prepared statement of Senator Lautenberg follows:]

STATEMENT OF SENATOR FRANK LAUTENBERG, A U.S. SENATOR FROM THE
STATE OF NEW JERSEY

As you all know, I was opposed to this quick hearing and markup because I thought we were making significant strides that would have lead to a bi-partisan bill.

After reviewing the draft bill of Senators Chafee and Smith, I must say I am very disappointed. Provisions in this bill weaken our commitment to clean up some of these poisoned sites and put us in the business of warehousing toxic waste.

This won’t make sense to most Americans. What we’re saying is that while we can’t find money to help rebuild our Nation’s schools, we will spend millions to create environmentally-dangerous museums to our polluting past.

Other problems in the Chafee/Smith bill—. In 1993 and 1994, we agreed to give communities greater input in cleanup decisions and greater access to critical health information. This bill weakens those provisions.

In addition, sites that took household garbage and toxic wastes are now Federal responsibilities. That lets corporate polluters off the hook and sticks the taxpayer with the bill. For instance, in a site in my home State of New Jersey, called Lipari Landfill, corporate polluters who would have been forced to pay millions of dollars in clean up costs because they mixed their cafeteria garbage with industrial wastes.

Some will have argue that this change is fair because these sites were poisoned by so many entities—from large corporate polluters to single individuals—that it is impossible to assign blame and cost. This bill does give some needed relief to small business, municipal and county governments and certain small polluters.

And I agree that we should give relief to some of the small fish who did the least of the damage. But ultimately the parties helped the most by this bill are the large polluters who caused the most damage. Why are we letting them off the hook?

In fact, I think the relief for small business, for instance, in the bill seems very inadequate. Their relief is only for what they do in the future. They are still liable for past damages.

Mr. Chairman, as the public tells us it wants greater environmental protection, what does S.8 provide? It provides less. It provides for fewer cleanups. It makes it easier for polluters to saddle the taxpayer with the bill. It will leave pollution onsite and call the cleanup complete.

If the goal is to draft a bill that will become law, I would urge the reopening of bipartisan negotiations that will lead to a signing ceremony in the Rose Garden and a victory for our environment. Let's fight for more. Not less.

Senator CHAFEE. Thank you.

I'm not sure I will agree with the characterization of any markup as being a "partisan markup." Certainly no markup I've ever run around here has ever been a partisan markup.

Senator LAUTENBERG. I don't know, Mr. Chairman, since you've mentioned it, whether there's been any real Democratic input on this.

Senator CHAFEE. We haven't gotten to the markup yet.

Senator BOND.

Senator SMITH. Incredible. Unbelievable.

OPENING STATEMENT OF HON. CHRISTOPHER S. BOND, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Mr. Chairman, based on your request that we get on with the hearing and let people have comments from the witness table on the mark rather than arguing about something that hasn't even come up before a markup, let me just say that the current law is broken. I commend you and Senator Smith for putting forward a draft. I look forward to hearing the comments and criticisms and praises on it, and I am hopeful that consensus can be reached on a reauthorization that will result in real reform which will, No. 2, lead to more money for Superfund, and No. 3, provide speedier cleanups, lest costly approaches, incentives for redevelopment, and an eventual end to the program.

Senator CHAFEE. Thank you, Senator. We appreciate the interest you have shown as a member of the Appropriations Committee in connection with this program.

Senator Thomas.

Senator THOMAS. I got your note, Mr. Chairman.

Senator CHAFEE. Thank you. Thank you very much.

[Laughter.]

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. I composed a little poem for you.

"There was a young man from the West/who tried to make his statement the best/but he failed at that sport/because his time was too short."

[Laughter.]

Senator CHAFEE. You go to the head of the class.

[Laughter.]

Senator CHAFEE. Senator Allard, from the West.

**OPENING STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR
FROM THE STATE OF COLORADO**

Senator ALLARD. Mr. Chairman, I want to thank you for holding today's hearing and I look forward to moving forward with the Superfund legislation. I want to see it move forward. I know that you and Senator Smith have both shown a lot of perseverance in trying to work with all the parties.

You know, I happen to be of the feeling that we could move a lot further, a lot quicker, if we could make Federal agencies live under the same laws as local officials. We're going to have some local officials to hear from, as well as private entities. We've got some examples in the State of Colorado, for example, where the Environmental Protection Agency is actually a party to a Superfund site, along with a private entity, and yet the Environmental Protection Agency is held to a different standard than that private party. That's not only happened once; it has happened three other times, and I think it's important that we make sure that Federal agencies have to comply with the same rules as local governments and private parties.

My colleague over there from New Jersey mentioned the "shady polluter." Well, if you look at a report from the National Governors' Association, as well as the State Attorneys General Association, that "shady polluter" is the Federal Government. They are characterized as the largest polluter in this country.

So I think that we need to look very seriously, to make sure that if we really want to clean up the environment and we really want to make this a cleaner and better place for our children and grandchildren, we make the Federal Government an equal partner in resolving Superfund problems.

Thank you, Mr. Chairman.

[The prepared statement of Senator Allard follows:]

OPENING STATEMENT OF SENATOR WAYNE ALLARD, A U.S. SENATOR FROM THE
STATE OF COLORADO

Mr. Chairman, thank you for holding today's hearing to examine the latest Superfund reform legislation. I know this has been a long process for many and I admire Mr. Smith's and your perseverance. One of these days, perhaps, you will receive some cooperation from the executive branch and we can bring this saga to a close. However, as long as this Administration refuses to play by the same rules they enforce against private entities, I have no reason to believe they are serious about Superfund reform.

Specifically, I am speaking about how they handle clean up of Federal facilities. In Colorado we have several examples of lengthy enforcement delay, inaction, or different cleanup standards for Federal agencies. Take for example, a Superfund site located in Leadville, CO. At the site the EPA is one PRP and a mining company another. There is no difference in the actions they are taking, but there is significant difference in the cost of cleanup. While the private party is forced to have a water treatment facility that is clearly overdesigned, the EPA's water treatment facility is built at much lower spec's *despite the fact it is performing the same function*. Judging by the different standards applied, I can only guess that the EPA forgot an important caveat when they were touting their philosophy of "polluter pays"—"polluter pays unless it is the Federal Government" is clearly what they meant. Obviously, one of two things need to happen, this Administration needs to hold themselves to the same standard they hold private parties, or they should show more common sense and flexibility in dealing with reform legislation.

There are other examples that point out the difference in the executive branch's treatment of Federal entities and private entities. At the Federal Center in Colorado contamination caused by the Federal Highway Administration was migrating into a residential area. It took too long for cleanup to begin because the State had to

negotiate with the Federal Government and the EPA simply didn't act. Had this been a private entity, no negotiation would have occurred, cleanup would have begun as soon as the problem was discovered. Judging by the Administration's Superfund reform principle that states, "The Administration does not support legislative amendments specifically for Federal facilities", they have no desire to fix this problem.

In conclusion Mr. Chairman, this Administration either needs to determine they are going to live by the rules that everyone else has to live by, or they should recognize that the Superfund law they find too difficult to comply with causes the same problems for private parties. However, we should make clear that their philosophy of, "do as I say not as I do" is unacceptable. In order to achieve that end, I will be introducing legislation to ensure that if the Federal Government won't hold themselves environmentally accountable, other levels of government will.

Thank you Mr. Chairman, I look forward to the rest of the hearing.

Senator CHAFEE. Thank you, Senator.
Senator Boxer.

**OPENING STATMENT OF HON. BARBARA BOXER, U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thank you, Mr. Chairman. I also received your note, and I can't top what Senator Thomas did and therefore I will not abide by what he did.

[Laughter.]

Senator BOXER. But I will only speak for about 3 minutes.

We do have 97 Superfund sites in our State of California, the fourth highest after New York, New Jersey, and Pennsylvania, so we have major concerns. And because a lot of my concerns were not included in the bill, I think it is important that I lay them out.

Having said that, I want to perhaps do the same type of "good news, bad news" approach, but I do so enjoy working with the full committee chairman and very much with the subcommittee chair, and I really do hope I'll have that chance, more than I've had, because I think that the concerns that I will lay out here are important to the people of the country. So let me try to lay them out briefly.

I ask unanimous consent that my full statement be made part of the record.

I think there are three principles we must adhere to in any bill, whether it is a Democratic bill, a Republican bill, or, hopefully, a bipartisan bill.

First, Superfund must include appropriate and carefully crafted guidelines that will guarantee that the public health is protected, now and in the future.

Second, parties responsible for polluting a site must be held responsible for site cleanup and restoration.

Third, Superfund must ensure expeditious and efficient cleanups.

Mr. Chairman, there are key areas in the draft proposal before us today that do not meet these principles, in my view, and let me quickly explain some of these concerns.

First, I am concerned with the fact that there is no explicit requirement in the bill that cleanup standards be set at levels that protect the health of children, the elderly, and other vulnerable subpopulations. Now, I am very proud to say that this committee, when we drafted the Safe Drinking Water Act and we worked so closely together, did accept an amendment that would set the standards to our most vulnerable populations. I think we should do

no less. As a matter of fact, I think we should do that in all of our environmental laws. I have authored the Children's Environmental Protection Act, and I hope that we can incorporate that into this bill. We did it in Safe Drinking Water. I think it is very appropriate.

If we're going to allow a lower cleanup standard, we should only do so if we can assure that it will protect children, and we haven't done it.

Second, I am concerned with provisions in the draft bill concerning "hot spots" and how these provisions could short-circuit ongoing "hot spot" cleanup efforts. For example, in the San Gabriel Valley in California, the San Gabriel Water Quality Authority, together with a few potentially responsible parties, are working on the treatment of three local "hot spots." This bill, as it is drafted, could jeopardize "hot spot" treatment projects in the San Gabriel Valley because it removes the preference for treatment in favor of containment of contamination, and I think that this is another very important point.

Mr. Chairman, 92 percent of the National Priority List sites in California involve groundwater contamination. Over 3.2 million people get their drinking water from aquifers below which a site is located. Half-assurances are not adequate for my constituents.

Third, I am concerned that the natural resource damages—NRD—title in the bill, which provides for restoring natural resources that have been damaged by a polluter, is not strong enough. In southern California we have an NRD site called Montrose. The Montrose site involves the discharge of tons of DDT off the coast of Palos Verdes, near Los Angeles, which nearly decimated the area's bald eagles, peregrine falcons, brown pelicans, and other birds, and caused many species of fish to become unfit for human consumption. Strong NRD provisions will ensure the restoration of these resources for future generations.

Fourth, I am concerned about provisions in the bill that would exempt hazardous waste generators and transporters from any liability at co-disposal sites. This would exempt every large polluter from liability at these sites, and clearly goes against the "polluter pays" principle.

Mr. Chairman, I have other areas of concern, including the role that communities have in developing cleanup plans; the expanded role that States will have in administering cleanups at National Priority List sites; and the general limits of public participation in decisionmaking.

Again, I just have to say I do enjoy working with my colleagues who are in charge of this whole venture of rewriting this law. Absolutely, we need to do better here, but I really believe that the points I have made are significantly disturbing because I think it goes against what we really need to do with Superfund, which is to make sure that we can restore these sites to protect the most vulnerable populations.

Thank you very much.

[The prepared statement of Senator Boxer follows:]

STATEMENT BY SENATOR BARBARA BOXER, A U.S. SENATOR FROM THE
STATE OF CALIFORNIA

Mr. Chairman, as you know Superfund reauthorization is of critical importance to the people of California. My State has 97 Superfund sites—the fourth highest after New York, New Jersey and Pennsylvania. Superfund activities to clean our water, restore our soils, and eliminate potential exposure to hazardous materials affect the majority of the citizens of my State. Californians want and deserve a strong Superfund.

When considering reauthorization of Superfund, there are three principles that we must adhere to.

First, Superfund must include appropriate and carefully crafted guidelines that will guarantee that the public health is protected now and in the future.

Second, parties responsible for polluting a site must be held responsible for site cleanup and restoration.

Third, Superfund must ensure expeditious and efficient cleanups.

Mr. Chairman, there are key areas in the draft proposal before us today that do not meet these principles. Let me explain what some of my concerns are.

First, I am concerned with the fact that there is no explicit requirement in the bill that cleanup standards be set at levels that protect the health of children, the elderly, and other vulnerable subpopulations. By lowering remediation standards from 10^{-6} (Ten to the minus six) to a range of between 10^{-6} and 10^{-4} , this bill specifically endorses a lower standard which may not protect children. If we are going to allow a lower cleanup standard, we should only do so if we can ensure that it will protect children and other vulnerable subpopulations.

Second, I am concerned with provisions in the draft bill concerning “hot spots,” and how these provisions could short circuit ongoing “hot spot” cleanup efforts.

For example, in the San Gabriel Valley in California, the San Gabriel Water Quality Authority, together with a few Potentially Responsible Parties (PRP's) are working on the treatment of three local “hot spots.” This bill could jeopardize “hot spot” treatment projects at South El Monte, because it removes the preference for treatment in favor of *containment* of contamination. It is not enough to say that treatment will be the preferred method of cleanup *only* when “contaminants cannot be reliably contained . . . and present substantial risk . . . because of high toxicity . . . and there is a reasonable probability of actual exposure . . .”

Mr. Chairman, 92 percent of the National Priority List sites in California involve groundwater contamination. Over 3.2 million people get their drinking water from aquifers over which a site is located. Half assurances are not adequate for my constituents. We must ensure that highly toxic and mobile contaminated groundwater be treated to avoid migration and further groundwater contamination.

Third, I am concerned that the Natural Resources Damages (NRD) Title in the bill, which provides for restoring natural resources that have been damaged by a polluter, is not strong enough.

In southern California we have an NRD site called Montrose. The Montrose site involves the discharge of tons of DDT off the coast of Palos Verde near Los Angeles, which nearly decimated the area's bald eagles, peregrine falcons, brown pelicans, and other birds, and caused many species of fish to become unfit for human and wildlife consumption. Strong NRD provisions will ensure the restoration of these resources, for future generations.

Fourth, I am concerned about provisions in the bill that would exempt hazardous waste generators and transporters from any liability at “co-disposal” sites (where hazardous waste was disposed together with municipal waste). This would exempt every large polluter from liability at these sites and clearly goes against the polluter pay principle.

Mr. Chairman, I have other areas of concern including the role that communities have in developing cleanup plans, the expanded role that States will have in administering cleanup at National Priority List sites, and the general limits of public participation in decisionmaking.

Mr. Chairman, because of the scope and importance of this bill, I hope that following this hearing we will work together to shape a bill all of us can support and that is worthy of the people we serve.

Senator CHAFEE. Next will be the ranking member of the full committee. After that, I just have to restrict all statements to no more than 2 minutes. We have nine witnesses here; we're restricted to 4:30, and these witnesses have come a long way.

So, Senator Baucus, you are on your own, but after that it will be 2 minutes.

**OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR
FROM THE STATE OF MONTANA**

Senator BAUCUS. Thank you, Mr. Chairman. I also apologize for my delay. The President has nominated Mr. Peter Scher to a new position, to be Ambassador for Agriculture. It's a very important position. Chairman Helms is holding his confirmation hearing at this moment, and that's the reason for my delay. I might say that Mr. Scher is my former chief of staff.

Senator CHAFEE. Is Will's name on that list?

Senator BAUCUS. Mr. Scher is taking a different tack.

[Laughter.]

Senator BAUCUS. Mr. Chairman, I don't know about everybody else, but when I return to Washington, I always have trouble adjusting to remembering all those odd Superfund acronyms that were being tossed about so frequently before the August recess, like RODS and RAPS, ROARS and RACS and TAGS and CAGS—I mean, there's just no end to this stuff.

But I do want to tell you what I did hear when I was on the recess break in Montana this last August, and that is that people want us to go on with the Nation's work. They are basically quite proud of us in putting together a bipartisan budget agreement; that makes a big difference to the vast bulk of the American people. And I think that's how they want us to approach our work. Essentially, do what's right: "We sent you people back there to get the job done. Be fair. Don't stray too far off in one direction or the other, but just do the right thing and get it done." I think that's basically what the American people want. It's basic American common sense, that's what it is, not going too far to one extreme or the other.

I think that the Superfund mark before us is a good step in that direction. It's not all the way there yet. I must say, Mr. Chairman, that I am very proud of the efforts that you and Senator Smith have made to help reach bipartisan agreement here because, in my judgment, there will be no Superfund reauthorization unless it is done on a bipartisan basis. That means both of us, Republicans and Democrats, have to think a little more deeply, a little more creatively; not dig in our heels quite so much, but rather work in the people's interest.

I know that you, Mr. Chairman, very much want a bill. I can say for all of us on our side that we, too, very much want a bill to progress, and I compliment you for the efforts that you and Senator Smith have made. We are close.

Let me give an example of some of the areas where I think we've made a lot of progress. One is that we're pretty close to an agreement in giving local citizens a greater role in Superfund cleanup decisions. We're getting there; we're close. We are also making progress in making it easier to return land to productive use as so-called "brownfields." That's progress, and also to improve Superfund cleanup standards. That's the good news.

But all the news is not good. From my perspective, Mr. Chairman, I still think there are some areas where we have to do some

more work. Some provisions of the proposal would, regrettably, weaken the protection of public health and the environment rather than strengthening the protection of the public health and environment. Some would generate more litigation and delay, not less, and I think some provisions of the bill would let some responsible parties off the hook without good justification.

Let me be a bit more specific. The first is whether we should prefer cleanup plans that treat hazardous waste rather than just covering it up and leaving it there. Current law requires treatment in some cases where it doesn't really make sense; I agree with that, and I think the Administrator would very much agree with that as well, so we ought to fix that. This bill attempts to move in that direction.

In Superfund lingo, we should narrow the preference for treatment. But in some other cases, there are very good reasons to prefer treatment in order to protect public health fully. The mark before us contains a preference for treatment in certain situations; that is an improvement, but I am concerned that the preference is too narrow.

Another case where the bill would weaken protection is natural resource damages. Again, the mark makes some improvements, but among other things there is still the questions of how to take the inherent or intrinsic value of a resource into account. It's a very important issue. If we preclude the consideration of what the bill calls "nonuse value," you will undermine the whole point of Superfund's provision for restoring natural resources.

Take a remote wilderness area that has been damaged by pollution for many years. It can be restored. We can remove the waste, revegetate hillsides, and replant streambanks. It takes time and money, but it can be done. However, if we are only allowed to consider the uses that the wilderness actually provides specifically to humans, we do much less. Maybe we've just put in some hiking trails near town, or expanded the parking lots near some fishing holes. After all, that would replace the lost human uses of hiking and the fishing base. But if we take that approach, we completely overlook the intrinsic value of a remote mountain wilderness area. The same would be true of a damaged river or of a seacoast, and the public, including future generations, will be badly short-changed. After all, this is an ethics issue; it is a morality issue; we should leave this place in at least as good a condition as we—our generation—has found it and has used it.

The third issue relates to the so-called "co-disposal sites," the large landfills that handle both household garbage and industrial waste, and that may involve hundreds of potentially liable parties. We all agree that the pizza parlors and the Boy Scout troops and similar groups should be eliminated from the Superfund system. That's clear. But I am not convinced that, having done that, we also need to eliminate the liability of financially viable companies that generated large amounts of hazardous waste. I just don't understand why taxpayers should pick up their tab—or, alternatively, why we should shift money away from cleanups in order to provide relief for these companies.

There are other issues, like reopening settled cleanup decisions, and how we create an appropriate State-Federal partnership. I

hope we can address those issues at this hearing, Mr. Chairman. But let me say again, you've made a lot of progress; I compliment you for that, but we still have a way to go.

My hope is that we can resume our bipartisan negotiations in order to resolve our remaining differences. I continue to believe that this approach is the one that is most likely to produce a bill that is good for the economy and good for the environment. That's what we did in the last Congress when we wrote a bipartisan bill reforming the Safe Drinking Water Act, and that bill passed the Senate by a vote of 99 to 0. I am very confident that under your leadership, Mr. Chairman, we can do that here.

[The prepared statement of Senator Baucus follows:]

STATEMENT BY SENATOR MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you, Mr. Chairman. I don't know about everybody else. But I'm having a little trouble adjusting to Washington after the long recess. For one thing, I've been struggling to remember all of those odd Superfund acronyms.

Believe it or not, when I was in Bozeman, and up at Flathead Lake, I didn't hear a single thing about RODs, RAPs, RARs, or RACS. Not even TAGs or CAGs.

I'll tell you what I did here, again and again.

People want us to get on with the Nation's work. To shift from confrontation to cooperation. To listen to each other's point of view, and strive for bipartisan agreements that reflect common-sense balance.

The budget agreement is a great example.

This committee can provide another great example, by writing a solid, bipartisan Superfund bill.

The Democratic members of the committee want a Superfund reform bill.

And we know that you, Mr. Chairman, and our subcommittee chairman want a bipartisan bill.

We've made progress. The draft chairman's mark makes significant improvements, in part reflecting the bipartisan negotiations that occurred in June and July.

We are pretty close to an agreement on several important sections of the bill, including provisions:

- to give local citizens a greater voice in Superfund cleanup decisions,
- to make it easier to return land to productive use at so-called "brownfields,"
- and to improve Superfund cleanup standards.

That's good news.

But the news is not all good. From my perspective, the chairman's mark still falls short, in several important respects.

Some provisions of the proposal would weaken the protection of public health and the environment, generate more litigation and delay, and let some responsible parties off the hook without good justification.

Let me be more specific, about a few important issues.

The first is whether we should prefer cleanup plans that treat hazardous waste, rather than just covering it up and leaving it there.

Current law requires treatment in some cases where it doesn't really make sense. We ought to fix that. In Superfund lingo, we should narrow the preference for treatment.

But in some other cases, there are very good reasons to prefer treatment, in order to fully protect public health.

The chairman's mark contains a preference for treatment in certain situations. That's an improvement. But I am concerned that the preference is too narrow.

Another case where the bill would weaken protection is natural resource damages.

Again, the chairman's mark makes some improvements.

But, among other things, there is still the question of how to take the inherent, or intrinsic, value of a resource into account.

It's an important issue. If we preclude the consideration what the bill calls "non-use value," we will undermine the whole point of Superfund's provision for restoring natural resources.

Take a remote wilderness area that's been damaged by pollution over many years. It can be restored. We can remove the waste, revegetate hillsides, and replant stream banks. It takes some time and money. But it can be done.

However, if we're only allowed to consider the uses that the wilderness provided, to humans, we'd do much less. Maybe we'd just put in some hiking trails near town,

or expand the parking lots near some fishing holes. After all, would replace the lost human uses—the hiking and fishing days.

But if we take that approach, we completely overlook the intrinsic value of a remote mountain wilderness area. The same would be true of a damaged river or sea-coast.

And the public, including future generations, would be badly shortchanged.

The third issue relates to the so-called “codisposal” sites, the large landfills that handled both household garbage and industrial hazardous waste and that may involve hundreds of potentially liable parties.

We all agree that the pizza parlors, boy scout troops, and similar entities should be eliminated from the Superfund system.

But I’m not convinced that, having done that, we also need to eliminate the liability of financially viable companies that generated large amounts of hazardous waste.

I just don’t understand why taxpayers should pick up their tab. Or, alternatively, why we should shift money away from cleanups in order to provide relief for these companies.

There other issues, like reopening settled cleanup decisions, and how we create an appropriate State/Federal partnership.

I hope we can address those issues in the hearing.

Let me say again: we’ve made a lot of progress. But we still have a long way to go.

My hope is that we can resume our bipartisan negotiations in order to resolve our remaining differences.

I continue to believe that this approach is most likely to produce a bill that’s good for the economy and good for the environment.

That’s what we did last Congress, when we wrote a bipartisan bill reforming the Safe Drinking Water Act that the Senate passed by a vote of 99–0.

I remain confident that, under our chairman’s leadership, we can do it again.

Senator CHAFEE. Thank you very much.

Senator Inhofe.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you, Mr. Chairman. I will adhere to your time schedule and be very, very brief.

I would only want to say one thing in regard to something that Senator Lautenberg said.

I know through my staff, Senator Lautenberg, that Senator Smith has worked some 200 hours with your staff, with our staff—I would call in and get reports quite often; I wouldn’t want anyone within listening range to think that he was being partisan during the development of the starting point that we’re addressing here today.

There are a lot of things in this bill that I was going to address in an opening statement. Instead of that, of course, I will submit my statement for the record. But I do believe that we’ve made some progress in joint and several liability; not, in retroactive liability, in my opinion. I agree with Senator Kempthorne in terms of the NRD. I believe that we have a lot more to do.

But one thing that I would like to bring out that hasn’t really been addressed is that we need to be considerate of the oil and gas industry during the course of these deliberations. Right now we are more than 50 percent dependent on foreign oil for our ability to fight a war. I serve on this committee, as well as the Intelligence Committee and the Armed Services Committee; I consider this to be something very, very serious. Right now, the oil and gas industry pays over 50 percent of the taxes that go into this, and I think this needs to be addressed during these discussions.

Thank you, Mr. Chairman.

[The prepared statement of Senator Inhofe follows:]

PREPARED STATEMENT OF JIM INHOFE, U.S. SENATOR FROM THE
STATE OF OKLAHOMA

Mr. Chairman, thank you for holding today's hearing on S.8, the Superfund Bill. I would like to commend both you and Senator Smith for moving the Superfund process forward. You both deserve a lot of credit for getting us to the point we are today. This committee has been working through the Superfund mess for years, including the last 2½ years under your leadership. After months and even years of negotiations I am happy that we are finally moving forward.

I know that members on the other side of the aisle are not happy with all parts of the chairman's draft, to them I would say that this is not what we will be voting on next week. There will be amendments from both sides and I hope when all is said and done we can come together and report out a bipartisan Superfund Bill.

Personally I am disappointed with several areas of the Bill, and I hope to work with my colleagues over the next week to improve the legislation. I would like to outline a few of my concerns.

First on the liability section, while the bill goes a long way in addressing the joint and several liability problem innocent parties are still responsible for unattributable waste, which would best be left to the orphan share.

In addition, last Congress I raised several specific cases during the Superfund hearings, I would like to remind my colleagues of two of those. The first involved the auto dealers in Oklahoma City who sent their used oil to a registered dealer and were held liable even though they did nothing wrong. The second case involved the Mill Creek Lumber Company who sent their used crank case oil to a licensed recycling and disposal center. In both of these cases we have innocent parties who did nothing wrong, the problems occurred later in the process. Unfortunately under the liability provisions of the Bill they would still be liable. They don't fall under the small business exclusion or the recyclers provision.

I think both provisions need to be amended. The small business provision needs to use the same definitions of other Federal programs and the recycling provision should include the generation and transportation of oil and solvents.

Under Natural Resource Damages, the bill makes many improvements over current law but I believe some areas need to be clarified and amended. We have to be sure that non-use and lost-use damages are not collected, no matter what they might be called. In addition, we need to be careful how we treat record review. We must ensure that all important information will be considered in a judicial hearing.

Finally, I am concerned how the oil and gas industry are affected by Superfund. Our country now imports more oil than we produce. This is a national security issue. As a subcommittee chairman on Armed Services and a member of the Intelligence Committee, I know first hand how important our oil supply is to our national defense and our Nation's economy. I want to make sure we are not creating problems in this committee that will need to be solved in my other committees.

Every time the Federal Government imposes more regulations on the oil industry, we start importing more oil and producing less. Superfund already hits the oil industry the hardest through the taxes. They pay over 50 percent of the Superfund taxes. This Bill does not address their recycling or waste issues, even though their wastes have low toxicity. I hope to join my colleagues in addressing these concerns.

I thank the chairman for calling today's hearing and I look forward to the witnesses' testimony.

Senator CHAFEE. Thank you very much, Senator.
Senator Sessions.

**OPENING STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR
FROM THE STATE OF ALABAMA**

Senator SESSIONS. Mr. Chairman, I would just say that I recall that at the first hearing we had, Senator Baucus said that he could think of no other area in which we could do more for cleanup and save money at the same time than maybe reforming the Superfund laws. I have a lot of complaints about it. I think we have already reached bipartisan agreement that a number of things need to be changed. The brownfields changes are important. We need to con-

tinue to work on the liability provisions and the remedy requirements.

I think we are making progress, but I feel very strongly that it is our duty, our responsibility, to see that we get the most cleanup for the taxpayers' dollar and the citizens' dollar, and I think we need to make sure that our legislation further cleanup rather than excessive and unnecessary costs.

Senator CHAFEE. Thank you, Senator.

Senator Reid.

**OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR
FROM THE STATE OF NEVADA**

Senator REID. Mr. Chairman, when I first got here there was a lot of talk about a note going around. I never got one. Finally when I got one, it was unsigned.

[Laughter.]

Senator REID. So I figured——

Senator CHAFEE. It was from me.

Senator REID. Oh, I see.

Mr. Chairman, I have worked with Senator Smith on the Ethics Committee. He and I are the two ranking, Democrat and Republican, on that committee, and I have worked well with him. But I also want to say a word for my friend from New Jersey.

Senator Lautenberg is one of the reasons we were able to get a bipartisan budget bill. But for his ability to cross party lines and work with both Democrats and Republicans, we would not have gotten a budget bill. We looked to Senator Lautenberg for leadership in that.

I have to say, Mr. Chairman, I am looking to Senator Lautenberg for leadership in this issue, also. He has had a lot of experience in working with Superfund. He has spent his entire life in the Senate working on that one issue. We need to have him as a player in this legislation, and I am confident and hopeful that that would come to be.

I would also say that I have worked with a lot of people on the Federal level over the years, but I have found no one who has worked better with me and has been any better for the country than Administrator Browner. She is always available. She works with the most difficult issues, and Superfund is an example. If there is a bad law, you can't take care of it through administrative reform. We all acknowledge that Superfund has some problems, and she and her office are getting a lot of the complaints that aren't her fault. It's simply that she is following the law as best she can. She has tried administratively on a number of occasions to do things, but you can only carry the administrative aspect of the law so far, and I think she's done a good job on that.

I look forward to this hearing. I look forward to our coming up with a bill. I hope we can do that. It's not going to be easy.

Senator CHAFEE. Thank you.

Senator Graham.

**OPENING STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR
FROM THE STATE OF FLORIDA**

Senator GRAHAM. Thank you, Mr. Chairman.

Mr. Chairman, I wish to echo the comments that have just been made by my friend and colleague, Senator Reid, about both Senator Lautenberg and about my fellow Floridian, Carol Browner. They both bring a great deal of commitment and experience to this issue, and I know they will be extremely helpful to each of us individually and collectively on this committee in analyzing the proposal that is before us, and hopefully moving us toward the bipartisan consensus that, as Senator Baucus has said, will be critical in order to actually accomplish reform of this program—a program which, in my opinion, very much needs that reform in order to achieve its intended public purpose.

Senator CHAFEE. Thank you, Senator.

Senator Wyden.

**OPENING STATEMENT OF HON. RON WYDEN, U.S. SENATOR
FROM THE STATE OF OREGON**

Senator WYDEN. Thank you, Mr. Chairman. I, too, will be very brief.

I think it is possible to have real reform of the Superfund program and real cleanup of Superfund sites. I don't think it has to be one or the other.

There are two areas that I am especially interested in tackling on a bipartisan basis. The first is ensuring the protection of all beneficial uses of water. This should include drinking water, agricultural uses, industrial uses. My sense is that we are going to have water shortages all across this country. I am very much looking forward to working with my colleagues on a bipartisan basis to addressing the water issue in this debate.

The second area that I hope we will focus on is the issue of preventing innocent parties from becoming ensnared in the Superfund net, without letting responsible parties off scot-free. I know a number of my colleagues have mentioned that, as well. I think we are making some progress in this regard. We have a ways to go.

Finally, Mr. Chairman, my home State of Oregon offers a possible roadmap for bipartisan reform. In 1995, a Republican-controlled legislature passed an important bill, signed by a Democratic Governor, which contains a number of the principles that I think this committee is looking at. So I think that not only is it important to have bipartisan reform, but my home State shows that it can be done and it can be done expeditiously.

I yield back, Mr. Chairman.

Senator CHAFEE. Thank you, Senator.

Now, I think, Administrator Browner, let me just say that the interest in this subject shown by 18 members of this committee—14 have been here today—so we are all very, very concerned about this program. You have heard the statements from both sides. We're very glad you came here today, and we want to welcome you, Administrator Browner, so if you would proceed, we would appreciate it.

Thank you.

**STATEMENT OF HON. CAROL BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY**

Administrator BROWNER. Thank you, Mr. Chairman, for the opportunity to appear here today.

I think this is the second time this year that I have testified before the Environment and Public Works Committee on Superfund reform legislation, and I will say to you, Mr. Chairman, and all the members of this committee, I will gladly come back here a third, fourth, fifth time, whatever it takes to get a Superfund bill that we all can agree on, a bill that will build on the progress that the Clinton Administration has made through a series of administrative reforms to make the Superfund program work faster, fairer, and more efficiently.

Mr. Chairman, I want to be very, very clear about the Clinton Administration's position. We are strongly committed to working with this committee, with other Members of Congress, to enact responsible Superfund reform legislation this year. And as you said, by "this year," we would hope that that is this calendar year.

Mr. Chairman, I have to say that the recent trade press reports notwithstanding, I think you and I both know that we have made progress toward common ground, that we have actually narrowed some of the gaps that have existed, that we can continue to narrow those gaps. In the end, I believe we will deliver on our shared responsibility to protect public health and the environment by ridding America's neighborhoods of toxic waste dumps.

I am optimistic that, working together, we can achieve our common goal of a Superfund program that cleans up more toxic waste sites faster, protects the health of our citizens, and returns land to communities for productive use. At the same time, we must be careful not to undermine the significant progress we have already achieved in changing and improving the program. We undertook a series of administrative reforms over the last 5 years that have resulted in a program that today provides significantly faster cleanups at a lower cost than it did several years ago. On average, we have cut more than 2 years off the time it takes to clean up a Superfund site, and we are well on our way to achieving our goal of saving even more time.

We are making historic progress on a major goal of this Administration and this committee: reducing litigation and transaction costs; working more cooperatively with responsible parties; increasing the fairness of the liability system; getting the little guys out of the litigation web that surrounds many hazardous waste sites. The Clinton Administration has acted to remove more than 9,000—9,000—small parties from Superfund litigation over the past 4 years. That is within the context of a law that we all agree needs to be rewritten. We are doing it administratively, and we are expanding that effort.

Thanks to our administrative reforms, the Superfund program is faster, fairer, and more efficient than it used to be. We have completed construction of a total of 292 Superfund cleanups over the past 4 years, more than in the previous 12 years combined. More than 80 percent of all Superfund sites are construction either complete or are in the midst of cleanup construction. Eighty percent were either done or we're in the process of completing the cleanup.

We recognize that resources are an important part of how we go about giving these communities back these sites. The President has committed to doubling the current pace of cleanup by cleaning up 900 toxic waste sites through the year 2000. This was a subject of discussion during the budget negotiations, and obviously we all need to work together to ensure that the funds are supplied so that we can meet this goal of 900 sites by the year 2000.

We have been achieving all of this progress while keeping faith with the original promise of the Superfund law: protecting public health and the environment first, and ensuring that wherever and whenever possible, those responsible for polluting a site—and not the taxpayers—are held responsible for the cost of cleaning up that site. We believe that Superfund reform legislation can and should build on this progress.

Mr. Chairman, the bill that is now before us does show considerable improvements over earlier drafts. It would require cleanups to meet certain Federal and State standards. It would provide increased opportunity for the public to participate in the cleanup of toxic waste sites. It would require that groundwater around Superfund sites be cleaned up under the same standards used for drinking water. And it would provide a settlement process for those parties that contribute small amounts of hazardous waste to Superfund sites. These are some of the improvements. This is real progress. It is real progress toward consensus.

Provisions in the bill about which we continue to have significant concerns include, for example, failure to provide for adequate treatment of highly toxic or highly mobile hazardous waste. We are concerned that the bill would not ensure the containment and reduction of these sources of groundwater contamination. It would relieve large polluters from liability at landfills, even where they are a major contributor of hazardous waste. It would allow States to assume complex cleanup responsibilities without guarantees of public review or public comment, and without ensuring adequate legal authority to protect public health and the environment. And it would fail to ensure that public natural resources are restored as part of the Superfund process.

Mr. Chairman, I think what has happened is that in those areas where our staffs have engaged in lengthy discussion—perhaps discussions that we would all hope could go more quickly—we have, in fact, made progress. We have narrowed our differences; in some instances we have found common ground.

In the areas where we have not had that kind of opportunity for dialog, for in-depth discussion, we need to. We have differences; they may not be insurmountable, but until we begin the task, until we direct our staffs, until we take the time to talk through those differences, it will be hard to find the kind of consensus we all are striving for.

Mr. Chairman, in closing, I want to be very clear. This Administration wants to see Superfund reform passed into law. We want to see the program further strengthened along the principles we have previously submitted to this committee: protect human health and the environment; promote cost-effectiveness; foster the return of contaminated sites to productive use by their communities; hold polluters responsible, while at the same time allowing parties to re-

solve their liability as efficiently and as fairly as possible; encourage and support citizens in their efforts to participate in the clean-up decisions that affect their lives; and support a continued working relationship among all levels of Government in cleaning up the toxic waste sites.

The bottom line, Mr. Chairman, is that we want to fulfill our responsibility to find better, more effective ways to clean up the Nation's worst sites, to work with affected communities, and to give them hope for the future. We know that is your goal, too. Can we work together on this? Can we get back to the table and hammer out a bill that all of us can support? Can we do what is necessary to make Superfund reform happen in this Congress? I believe we can; I hope that we will.

Senator CHAFEE. Well, Madam Administrator, I want to thank you for that statement. That was a very fine statement, and there is little in it that I can disagree with in what you said. As you said, we have narrowed our differences. There is an opportunity there for further discussion, and we would invite you to—and we certainly will be present at such a gathering as soon as we can set it up.

I know Senator Smith feels that way. I do; I'm sure that you heard Senator Baucus' statements, and Senator Lautenberg's, likewise.

Obviously, to have this succeed, all of us have to give some ground. I'm not saying that what we've submitted here in the revisions is in concrete, but we certainly hope those on the other side come to the table recognizing that they have to make some concessions, likewise.

One of the problems that we always get into here—and you and I discussed this the last time you were here—is, who gets excused? As you know, we all agree that the *de minimis* contributors should indeed be excused. But then, pretty soon the rhetoric comes up that what we're proposing, or what somebody is proposing, is letting polluters off the hook. And that, of course, is an expression that could be used for anybody, the *de minimis* contributors.

As you know, in our bill we made special provisions for co-disposal sites where, at the time that the disposal was made in that site, it was legal. It was not illegal. I know that you are opposed to that provision. I wonder if you could say a few words on that?

Administrator BROWNER. Mr. Chairman, I think we have long articulated—

Senator CHAFEE. If I might add one thing, the objective being to get on with it. The belief that, yes, we could bicker over these things, but there comes a point where it's really worthwhile to just get it done with. And maybe somebody on the sidelines can harp that we're letting a polluter off the hook; obviously that's not our intention, but the principal objective is to get the thing done with.

Administrator BROWNER. First of all, we don't disagree with the need to get the thing done with. We also don't disagree with the need and the appropriateness of taking certain parties out of the liability net. I think all of us would agree that when Superfund was originally passed, no one who voted for it and no one who sought to develop the rules implementing it ever believed these

small parties would find themselves trapped in the way in which they have.

Where we have, I think, had some disagreement is how to best do that. And what we have continually said is, let's do it by party, not by site type. Let's make a public policy decision that if a party fits a particular definition—there have been various definitions offered over the last several years in terms of small business—we are more than happy to have that discussion. I think we have tremendous flexibility on what that definition should be. But let's do it by party, not by site.

We thought it might be helpful, Mr. Chairman, to just show you one of these co-disposal sites where we think discussions could take place, and where lines might appropriately be drawn. We're not saying we're wedded to this; we're saying it's something that needs to be discussed.

Oh, we're not allowed to put up the chart? I apologize.

Senator CHAFEE. Sure. Go ahead.

Administrator BROWNER. We do have handouts.

Senator CHAFEE. What's the problem?

Administrator BROWNER. I thought we had cleared it.

Senator CHAFEE. Well, how many do you have here?

Administrator BROWNER. We do have handouts for all of the members. We only want to put up one chart.

Senator CHAFEE. That's all right. Put your chart up.

We haven't received these in advance, so I'm not sure we can respond to them very well, but if it's part of your presentation, go ahead.

Administrator BROWNER. Well, it is an example of a co-disposal site. It's one that has received some amount of attention, the Keystone site. And I think it's helpful to understand the three groupings of parties at these sites.

First are the large owner-operators, major industrial generators. Those are the ones that EPA went to and asked for them to contribute to the cleanup costs. There were 11 at this site. Those 11, unfortunately, did turn around and seek contribution for cleanup costs from 168 other parties; those other 168 turned around and sought contribution from 589. EPA did not do this; we want to be very clear about this, EPA sought contribution for the cleanup costs from the 11 parties where we had documentation that the lion's share of the hazardous waste at this site had come. And I think within this chart you see here, deciding which parties are in and out makes absolute sense, and we will be more than happy to work with you on where to draw those lines. Our only objection is saying that all sites of this nature are automatically out of the requirement that any of the parties to that site pay their fair share. That is our only objection.

Beyond that, we are more than happy to talk to you about how to divide out the parties and how to define the parties so that everyone knows up front that you may be part of an allocation system, you may have a responsibility, or you absolutely have no responsibility.

Senator CHAFEE. OK. My time is up, but there will be further discussion, perhaps, on this same subject.

Senator Baucus.

Senator BAUCUS. Yes. That's a good point, Mr. Chairman. Let's stay on this subject for a while because I think it's one of the key points of this bill—that is, co-disposal.

I wonder, Administrator Browner, if I might echo the points that other Senators have made. I also know how hard you have worked, and particularly what progress you have made in administratively coming up with reforms to Superfund despite a statute which in some ways is very helpful, but in other ways very much gets in the way.

Could you just briefly State your concerns about the co-disposal provisions in the mark, and then give us some suggestions on how we might resolve some of that? Some of the concerns that I have, frankly, are that it's not fair to those companies that did not use municipal landfills, for example, but there are other thoughts that I'm sure you are going to have, too.

Can you just tell me the Administration's concerns, and then list some suggested solutions as to how we might bridge this gap?

Senator CHAFEE. What does this apply to, though? What are we—

Senator BAUCUS. The co-disposal provisions of the bill, the municipal landfills which received a lot of hazardous waste from PRPs.

Senator CHAFEE. The assumption being that all this took place—it was not done illegally?

Senator BAUCUS. Well, your concerns about that, Madam Administrator, as well as your suggestions.

Administrator BROWNER. Just for background information, there are approximately 250 of these type sites of which we are currently aware. There may be more. They are generally referred to as landfills; you had a lot of different things going there. In the case of this one, you had 11 companies sending a very large amount of hazardous and toxic waste, and you had others sending garbage, municipal solid waste.

Senator Baucus, our concerns are, No. 1, the cost to the fund. If you take this site as an example and say, "Nobody pays anything to cover the cleanup costs, nobody pays their fair share, including the very large contributors of hazardous waste, and that cost comes to the taxpayers," it is quite significant. It could shift approximately \$200 million to \$300 million in cleanup costs annually to the fund. These are costs that are currently being covered by the responsible parties. If you carve all of these sites out rather than saying that certain parties are taken out and other parties remain in, responsible for their fair share, then you have a large cost to the program.

Senator BAUCUS. We're talking about parties that deposited hazardous and toxic wastes—

Administrator BROWNER. Yes.

Senator BAUCUS [continuing]. At municipal landfills, is what we're talking about here?

Administrator BROWNER. Yes. I don't think any of us disagree that someone who sent their garbage should just be clearly taken out of the program. I don't think any of us disagree that small businesses that sent relatively small amounts should be taken out,

should not be subject to any of this. But for parties sending large amounts—

Senator BAUCUS. So one concern is the cost.

Administrator BROWNER. The second concern would be increased litigation. Everybody is going to want to get their site called a co-disposal site because it means they don't have any responsibility, so we would envision increased litigation over which sites are co-disposal and which sites are not, which sites are covered by the carve-out and which—

Senator BAUCUS. Is that a legitimate concern?

Administrator BROWNER. Yes.

Senator BAUCUS. Because that's not easily determined.

Administrator BROWNER. We actually spent a lot of time over the last couple of years trying to understand how you might craft a definition, and have been unable to our—

Senator BAUCUS. So litigation is the second concern. My time is running out.

Administrator BROWNER. OK. The third one is the one that you raised, and it is a fairness issue. It is an issue of, "So if I sent my waste to one type of site, I am responsible for cleanup costs, but if I was fortunate to have chosen another type of site"—same waste, identical waste—"I am not responsible for costs."

Senator BAUCUS. So if I am a big company, say, and I deposit my hazardous waste at my own site, then I'm not off the hook—

Administrator BROWNER. Right.

Senator BAUCUS [continuing]. But if I am another company and I put it in a municipal landfill, then I am off the hook?

Administrator BROWNER. Exactly. One of the companies in the 11 here is CSX, a very large operation. They were sending large volumes of hazardous waste to this landfill. They would be off the hook, as you say, for any cleanup costs at this landfill under a carve-out disposal. If they had sent it to their own site, if they had kept it on their property and that had created a Superfund site, they would be responsible for the cleanup cost.

Senator BAUCUS. Well, my time has expired. We haven't gotten to solutions yet, although you've certainly touched on a few.

Mr. Chairman, we'll get that on the next round, I guess.

Senator CHAFEE. All right.

Senator Smith will give us the solution.

[Laughter.]

Senator SMITH. Don't I wish.

Thank you, Mr. Chairman.

Ms. Browner, I felt that your comments as stated here were much more amicable in terms of reaching out here, trying to reach an accord, than perhaps your written statement was, so I appreciate that.

I just want to say that I think that based on the negotiations that we've had over the past several months and years, frankly, as I look down the nine titles of the bill, I don't think it's insurmountable. Without getting into a lot of detail in the short amount of time that I have, I think that if you look at five sections of the bill—community participation, State role, brownfields, Federal facilities, and funding, a part which we agree with, and then there is a miscellaneous thing in there on NPL caps—I think that even

though we don't have 100 percent agreement on those areas, I don't think there's any reason why we can't reach accommodation on those areas. However, the other three, and they are a big three—NRD, liability allocation, and remedy are big, and Senator Baucus just got into it.

Let me propose, Mr. Chairman, and it's your decision since you're the chairman, but I would be willing, if you feel in the interest of getting some type of agreement that it would be reasonable, to have a series of meetings, postpone the markup for another week, and sit down with you and Senator Baucus and Senator Lautenberg and myself and Administrator Browner in a series of meetings, however many we need to have at whatever time you want to have them, and try to work out an agreement. So I would certainly put that on the table for the chairman's consideration.

Senator CHAFEE. Well, I think that's an excellent idea, and I'm certainly willing to do it and spend the time on it. We've got a lot going on here with ISTEPA, but I think we can work it in, if it is agreeable with the Administrator and Senator Baucus.

Senator BAUCUS. Mr. Chairman, I would echo your thoughts. I think if we're going to get a bill, we're going to have to work on a bipartisan basis, and I very much appreciate that.

Senator CHAFEE. Thank you.

Senator SMITH. Well, I don't want to argue the "more bipartisan basis." I feel that we've worked on a bipartisan basis, but I'm not going to argue it because I don't want to take the time to do it. I don't know what more we could do.

Let me just pick up on what Senator Baucus was just questioning you on, on this issue of liability. What is wrong with keeping private owners liable for cleanup, but at the same time giving them a clearly-defined statutory share? You don't have that problem for public owners and operators; why do you have the problem with private owners and operators? You're willing to exempt municipalities and not hold them to that standard, and I support that. But I'm now trying to reach to the second level, which is the private owners and operators, in the sense that—you keep saying, well, we'll have this party aspect to it, and you say that litigation is going to increase, and so forth. The litigation that is going to take place here is when you try to allocate, which is what the last proposal you sent to us on this proposed; I know this is the first time we've been talking publicly about what we proposed, and I apologize for that. But in essence your position is, as you present that you present this material, these parties should be responsible for—well, let me go back.

I'm trying to synthesize this down. Your position is that the statutory share for a public owner and operator is OK, but it's not OK for the private individual. Now, if you look at the private individual, when you say to that private individual, "OK, 3 percent of this is nontoxic, and 97 percent is solid waste," or vice-versa, how are you going to make that determination? Are we going to be going through all that garbage? You talk about lawsuits, those are huge lawsuits—or certainly, if not lawsuits, some attempt at allocation. And I just don't see how you would do it. I mean, if it's a fairness issue, the fairness issue is that it wasn't against the law to do what

they did. And we're not talking about people who deliberately polluted beyond what was legal at the time.

I'm trying to understand your position. I have been trying to understand it for months here, to try to get to some accommodation. I don't know how you do it.

Administrator BROWNER. Well, let me make a distinction within the co-disposal universe, the 250 landfill sites. Some of them were owned and operated by municipalities, and others were owned and operated by private companies who were making money off of picking up and disposing of garbage, sometimes hazardous waste—

Senator SMITH. But it was legal.

Administrator BROWNER. I'm not getting into the question of what was legal or not legal here. I'm just making a distinction between a municipality that might have owned a landfill, and a private company seeking to make a profit.

I would just submit to the committee that that is a reasonable distinction to say, for a municipality who had to provide a service to the businesses, who had to provide a service to their constituents of picking up garbage, capping their liability is not unreasonable public policy. For the private company who was making profit on picking up garbage and disposing of it—and well-informed on what they were doing—asking them to cover the fair share cost of clean-up, as does any other company who was engaged in the production of hazardous waste, that strikes me as a reasonable place to make a distinction. It is a public policy call, without a doubt, and we frequently say in our laws to cities of certain sizes, to municipalities who perform certain services, "We're going to treat you a little bit differently than, perhaps, the for-profit company out there doing the same thing," and that's all we've proposed, is to recognize that a municipality may not have had a choice, and therefore to treat them somewhat differently.

But then to say to the private company—Fortune 500, in some instances—"Because you had what was called a landfill as opposed to a hazardous waste disposal site, you now get treated differently than your competitor, who ran a hazardous waste disposal site," that is troubling for us.

Senator SMITH. Mr. Chairman, I know my time is probably up, but could I just take 30 seconds for a response? I apologize.

We do, though. I mean, owners and operators, we have a 10 percent cap of 100,000—in the municipalities, 10 percent on less than 100,000. We have a 20 percent cap on over 100,000, and for private owners and operators, we have a 40 percent cap. So we do, and I don't know how you identify—maybe you could explain to us what criteria you are going to use for this so-called "party" that you are defining. What is the criteria? They have millions of dollars? They have no money? I don't know what the criteria is.

Administrator BROWNER. One that we have suggested previously—and we would be more than happy to talk about it, and there may be changes to this, something that we can all agree on—is a small business definition: 20 or fewer employees; \$2 million in revenues; 30 or fewer employees—I mean, I don't know what the right definition is of a party, but I can tell you, if you give us a definition, if we can all agree in a bipartisan manner on a definition, we can take a site like this—do you know what's happening

at this site today? EPA did not go after the 168. We did not go after the 589. But they are caught in this, and we are doing our level best to settle the matter, of a dollar a person. It is time-consuming. They are unhappy; we are unhappy; you are unhappy; everyone is unhappy.

Why not look at this? This is one where we can give you the information on 250, if you want, and say, "OK, fine. The 11, we think they should pay their fair share. Of the 168, draw the line here. The 589, draw the line there." We can come to an agreement on that and we can be done with these sites in a responsible and fair manner.

Senator CHAFEE. All right, fine. Thank you.

Now, Senator Kempthorne, Senator Bond, Senator Thomas, Senator Allard.

Senator Allard.

Senator ALLARD. Do you believe that the Federal Government has contributed any to the problems as far as some Superfund sites are concerned?

Administrator BROWNER. The Federal Government? Absolutely. I mean, as you well know, in your own State—

Senator ALLARD. Well, we agree on that.

Administrator BROWNER. We agree.

Senator ALLARD. But yet I can point to situations in my own State where the Federal agency is treated differently than the local government or the private parties. For example, in a community we call Leadville, actually, EPA is a responsible party, as is the local government. It is agreed that they are a responsible party. They both are required to put in treatment plants, and they're doing that; but the treatment plant that is required of the local government is much, much more expensive than the Environmental Protection Agency right in your own back yard is doing. It seems to me that there needs to be some fairness. I don't think you should judge liability based on whether they made a profit or not; I mean, some of these guys may be bankrupt, as far as I know. But I think we have to look at who is responsible, and I think the Federal Government is a major partner.

Would you agree with the National Governors' Association assessment, as well as the State Attorneys General Association assessment, that the Federal Government is a major polluter, if not the largest polluter in this country?

Administrator BROWNER. I am not familiar with either of those assessments. As I said before, I certainly agree—and your State is, unfortunately, an example, of where Federal agencies, not EPA at the larger sites, but certainly other Federal agencies are the principal parties responsible for some very, very large sites.

Senator ALLARD. And do you feel they should be held equally responsible for that?

Administrator BROWNER. In terms of the cleanups?

Senator ALLARD. Yes.

Administrator BROWNER. We have always maintained that the Federal facilities should be responsible for the problems they have caused.

Senator ALLARD. So you would agree that everybody else would be a responsible party—

Administrator BROWNER. I'm not familiar, if you're asking me just about the Leadville site. I don't think we're a PRP at that site. I don't think EPA is named a potentially responsible party. But I am more than happy to look at that.

Senator ALLARD. Well, let me bring up an example of where you are named a potentially responsible party. It's at the School of Mines in Golden, and this is State land that was managed by a research institute through the School of Mines. There was the Department of Defense, the Environmental Protection Agency, the Department of Energy and the Bureau of Mines that all had research facilities on this piece of land, as well as some private companies, as well as the State of Colorado through the School of Mines with some of their programs.

Everybody is forced to clean that up, except for the Federal agencies, which is the Department of Defense and the Department of Energy and your own agency, the Environmental Protection Agency, and the Bureau of Mines. In fact, the State of Colorado and the private parties are the only ones that have put up any money at all, and the Environmental Protection Agency refuses to do that.

It seems to me that in these situations where we have a hazardous waste problem, that the Federal agencies ought to be willing to do their fair share. Now, you can stand up here and say, "Well, let's take care of the children," and you are nodding your head, and "Let's take care of all the vulnerable people out here," but yet in your own back yard you have a problem and you're not doing your job.

Administrator BROWNER. Well, if we are a responsible party, and we have been a responsible party at sites—in fact, at the Leadville site we are not a responsible party, but we are paying some money. We run labs, we do generate waste, and we have been involved in some of these sites, and we agree with you that we have a responsibility, as does any other party to those sites, to address the problem that we created. And we are doing that. If there is a particular problem at this site, I am more than happy to work with you on it to resolve it.

Senator ALLARD. I have been informed by my staff that you just refused to admit that you are a responsible party at the School of Mines, even though there was research and lab equipment that was done there. We all know that in laboratories, there is a lot of hazardous material involved with a laboratory.

But it seems to me that at least the Federal agencies ought to be doing their fair share to clean this up, and I really do believe that the Federal Government is a major polluter in this country. You have directed all your comments just to one sector of our economy, and I think that we all have to take equal responsibility if we really want to see the environment cleaned up. I want to see a better environment for my kids and my grandchildren; I don't want to see my State polluted, and consequently I think the Federal Government ought to do its fair share, including your department, your agency.

Administrator BROWNER. We don't disagree with the fact that we are responsible parties—

Senator CHAFEE. We've got to move on to the next questioner. Thank you.

Senator Kempthorne.

Senator KEMPTHORNE. Mr. Chairman, thank you very much.

Madam Administrator, I recognize that EPA is not a trustee under the NRD program, but I would like to ask you about the relationship between the remediation program and the NRD program.

Would you agree that the NRD program should not duplicate the cleanup side of the program?

Administrator BROWNER. I apologize, Mr. Chairman, I meant to ask for your leave at the beginning, if there were questions of the trustees, since EPA is not a trustee, if we could have the trustees—we do have a representative here from the trustees to answer questions relevant to the trustees. We are not trustees; that is the way the law is structured, and we do have the Acting Deputy Director of NOAA, Terry Garcia, here with us to answer any trustee questions.

Senator KEMPTHORNE. I appreciate that. That's why I led off by saying that I recognize that EPA is not a trustee.

Administrator BROWNER. Right.

Senator KEMPTHORNE. So EPA is not a trustee. So because of my respect for you and the role that you're going to play in this, I'd like to ask you the question, and let me repeat it.

I'd like to ask you about the relationship, Madam Administrator, between the remediation program and the NRD program. Wouldn't you agree that the NRD program should not duplicate the cleanup side of the program?

Administrator BROWNER. They have to work together, yes. We would agree to that, they have to work together.

Senator KEMPTHORNE. All right, so you agree with that.

Wouldn't you agree that a company shouldn't be told that it must do additional cleanup from a site under an NRD claim after EPA has signed off on a cleanup action that protects human health and the environment?

Administrator BROWNER. That is not a yes-or-no question. The reason is that if you do the right kind of work on the front end in terms of both the cleanup and the NRD concerns—and the trustees are part of the process on the front end—then you shouldn't have any problems on the back end. I think, unfortunately, there have been sites where that has not occurred, and there are also sites where the NRD problem may be different than the traditional cleanup problem which is the focus of EPA. So to simply say you shouldn't be able to come in “after the fact,” after a cleanup plan has been agreed to on NRD, I don't think is something we can agree with you on. I think there is a way the process has to be structured, and in some instances the two are really quite separate and you have to allow for that.

Senator KEMPTHORNE. When you reference a process, do you feel that that's right, to say to a company, “These are now the requirements to clean up this site,” that company now cleans up that site, and the EPA signs off, “You've done a good job,” you've stated that 80 percent of the sites are cleaned up, should they now be subject to go another round of cleaning up the site based on NRD requirements?

Administrator BROWNER. The cleanup is focused on the hazardous materials. It is focused on ensuring that the problem doesn't get worse. Natural Resource Damages are focused on the restoration of the natural resources, the lost use, and it may well be—and we can certainly find out for you examples of where companies have felt like they first just wanted to get out and deal with their cleanup responsibilities; for a variety of reasons that made sense to them, and they wanted to delay agreement and whatever discussions needed to take place on their NRD responsibilities. But it is not always going to be the case that by simply cleaning up the hazardous wastes, you have spoken to the NRD concerns. They may be two separate issues.

So there is a second round; in some instances, that may be what the parties choose. In other instances, you may be able to do them together.

I think what you want to avoid, and this is something that I think is true throughout Superfund, is sort of a “one-size-fits-all” type approach. It's similar to what we talked about a lot on drinking water. None of these things are going to be identical, and you need to allow for some flexibility to take into account the differences.

Senator KEMPTHORNE. All right. My time has expired. Thank you very much.

Senator CHAFEE. Thank you.

Senator Bond, Senator Thomas, Senator Boxer, Senator Inhofe, Senator Sessions—Senator Inhofe.

Senator INHOFE. Thank you.

Madam Administrator, I'm going to try to be kind of specific in my questions because of the severe time limitations under which we're operating.

In your testimony you criticize the chairman's draft regarding brownfields, and at the same time you say that you want to encourage economic redevelopment of abandoned and contaminated properties. I recognize that since I am chairman of the Clean Air Subcommittee and we're going through this ambient air thing, that I don't want to drag that subject into it, but we can't really operate in a vacuum. What we do in Superfund is going to have an effect on what we do with ambient air standard changes that are totally separate issues.

We had testimony from the chairman of the Black Chamber of Commerce and the Mayor of Benton Harbor, MI, who testified that the new air regulations would stop any new industrial development. They specifically cited brownfields, saying that they would never be able to attract new businesses to brownfields areas because of the air regulations.

What would be your response to that?

Administrator BROWNER. We are extremely proud of our brownfields work. We think it has been a tremendous success in addressing the lightly contaminated, frequently urban sites, and in no way do we think that providing public health protections under the Clean Air Act will interfere with our brownfields program. We are working—in fact, I spoke yesterday to a mayor at the U.S. Conference of Mayors about how to ensure that the mayors have the kind of information that they think would be helpful to answering

those kinds of questions, but we don't see a problem between public health protections promised under the Clean Air Act and the redevelopment of brownfields.

Senator INHOFE. Well, Madam Administrator, you may have talked to one of the mayors, but the U.S. Conference of Mayors is on record on what they feel the results are going to be, and you did say in your testimony that you wanted to encourage economic redevelopment of abandoned and contaminated properties.

Again, I would say that in light of what they said very specifically in their testimony, would you say that they are wrong?

Administrator BROWNER. That somehow or another—

Senator INHOFE. They specifically cited brownfields, saying that they will never be able to attract new business to brownfields areas because of the air regulations. Are they wrong?

Administrator BROWNER. We absolutely disagree with that.

Senator INHOFE. So are you going to issue waivers?

Administrator BROWNER. They're not necessary. There is a way to have both redevelopment and cleaner air, and we are more than happy to work with the committee to make sure that the members understand that.

I will say, within S.8, the brownfields provision included in S.8 is something that we think is a demonstration of how the gaps can be closed and how consensus-based progress can be made. I think there were some technical changes we would like, but we think it is an example of what happens when we all work together to talk through how best to solve a problem. We think the provisions are good.

Senator INHOFE. OK.

In your testimony you criticize this bill—and I'm going to read—for offering a “confusing array of opportunities for States to implement the Superfund program, including authorization delegation and limited delegation.” Governor Nelson, who is here today and will be testifying before us in a few minutes, is going to say, according to his written testimony, “We appreciate the inclusion of options for expedited authorization delegation and limited delegation.”

It seems as though we've made the Governors happy and the EPA unhappy. Is that so? Who is right and who is wrong in this case?

Administrator BROWNER. We have no disagreement. In fact, we worked very closely with virtually every State in terms of their accepting responsibility on a site-by-site basis, on a variety of sites. I mean, I think it's been very successful in terms of saying who can best address a particular problem.

We also have instances where a State that is quite sophisticated has come to us—New Jersey is one example—and said, “We can't handle this particular site. Will EPA?”—

Senator INHOFE. Is Oklahoma sophisticated?

Administrator BROWNER. We've had some very positive working relationships with Oklahoma in terms of—

Senator INHOFE. Who is not sophisticated, then?

Administrator BROWNER. You have some States that don't have legislation. You have some States that have not provided funding for programs, and that is our concern. We have no disagreement

with States doing everything they possibly can. Our disagreement with S. 8 as currently written, No. 1, is the fact that a State can apply to EPA to take over even the most complex sites within their State, with no public comment, with no public review. We think that's a real problem. We think the people of a State should have the right to participate in their State's decision to take control of sites that perhaps we had been managing.

Senator INHOFE. But your statement said, again, "the confusing array." You specifically said that we're not really addressing this properly in terms of how we are allowing the States to handle some of these problems, while the witness that will be testifying on behalf of all the Governors says that they think it's done a pretty good job.

So one of you is right and one of you is wrong, and I'm just saying, who is wrong?

Administrator BROWNER. I don't think it's a question of who is right or wrong. What we would suggest in terms of States is that we be allowed and they be allowed the flexibility to determine, on a State-by-State basis, and in some instances on a site-by-site basis, who can best do the job of managing a cleanup. There will be times when New Jersey wants us to take a site. There will be times when Oklahoma asks us to take a site, as there have been. There will be other times when, quite frankly, they are far better suited to deal with it than we are. Allow us the flexibility to resolve that.

Senator CHAFEE. Thank you very much.

Senator Lautenberg.

Senator LAUTENBERG. Thanks very much, Mr. Chairman.

First I want to clarify something that apparently was misunderstood. I don't retract the principle of what I said, but our colleague from Oklahoma asserted that Senator Smith and Senator Chafee had done a lot of work, and there is no question about that. I wasn't impugning their schedules or their interests or otherwise. My statement was really relevant to the fact that we were suddenly going to see a markup upon which there was no agreement that included Democrats, and to me that suggests that it's partisan.

But, listen, I work very closely with Bob Smith and with Senator Chafee and I consider them friends. We share an agreement once in a while; that's how close we are.

[Laughter.]

Senator LAUTENBERG. So I meant no impugning of character, interest, or effort, I assure you.

In terms of the brownfields development, I can tell you of some smashing successes, one in New Jersey that was turned into retail space where people are employed. This field lay fallow for such a long time in the middle of a community that really needs developing. It now has a very significant retail establishment with about 400 people working there in Hackensack, NJ. Thousands of customers weekly come there. They bring income into the community. They have uplifted the life around there. I think it's a very positive program, and I believe there may be some misunderstanding about definitions, and I respect what the Senator from Oklahoma said about a disagreement. But there is no right and no wrong.

So I think we have to take it on kind of a case-by-case basis. I know that the work I have done on brownfields has been one of the more satisfying aspects of my focus on environmental issues, and has had a lot of development, a lot of support.

I would ask you this, Ms. Browner. One of the things that I think we disagreed with is carve-outs. What do we do if there is co-disposal? There was an allocation discussion and resolution at Old Southington in Connecticut; are you familiar with that? My understanding is that it worked very well, and in very short order the parties settled the liability and moved on with their lives; indeed, the settlement was fair to the municipalities and the homeowners.

So wouldn't it seem that S.8's exemption for sites like this is kind of an overkill? We can use the process, and that is what we wanted to do together, and that is to provide another method for resolving these disputes. Has it worked well at other places?

Administrator BROWNER. We certainly agree that an allocation system is an important tool. Under the existing law we have piloted about a dozen allocation efforts to see what might make sense.

The one short piece of information I would leave you with is that at some sites it works well, and at other sites the parties want to do it themselves. Just make sure that if you do anything on allocation in legislation, to allow for flexibility. I think we would be concerned that we are mandated at every single site. There are just times, as you can well imagine, getting four people in a room and being done with it in an afternoon is how it can go, and there are other times where you have to bring in an outside party and wade through a couple of months.

So our experience on allocation is that it's a great tool; it should be part of Superfund. We are piloting it, but let's not turn around and say that every single site should have an allocator, because that may create its own problems.

Senator LAUTENBERG. Thanks.

Thanks, Mr. Chairman.

Senator CHAFEE. Thank you.

Senator Reid.

Senator REID. Mr. Chairman, we continually hear all the bad stories about Superfund. We in Nevada have had a great experience with Superfund involving a thing called the Helms Pit, which was a big gravel pit that started collecting water. I'm not going to go into a lot of detail, but there was an emergency Superfund site declared in Sparks, and it led to the resolution of issues very quickly. And had the EPA not come in there with the expedited powers that they have under the act, it could have destroyed the entire water supply of Reno and everything downstream including Fallon and Fernley and the Indian reservation at Pyramid Lake.

So there are examples that could be cited, if we would take the time, where this law—as bad as it is—has worked quite well. That pit now is going to be used as a recreational site. At one time there was an estimated 14 million gallons of fuel in the ground at Sparks; it's determined that it's probably only about 2 million gallons, but it still is very volatile and very dangerous.

I would like to go back to what Senator Baucus talked about, and maybe one of the other members here. How do we handle these

large landfills, as an example, where people year after year put stuff in that, and it wasn't illegal at the time? How do we handle a situation like that?

Administrator BROWNER. What we would like to do is have a discussion with members about which parties to those sites should be automatically taken out in the statute. A homeowner who sent municipal waste is an obvious example of someone who I think we would all agree—

Senator REID. But, Madam Administrator, let's talk about businesses. Businesses who in good faith go out and dump their stuff in a landfill—there was nothing illegal about it. People watched them do it. They thought they were doing the right thing. And now, 15 years later, they come back and because of the legal costs alone, businesses are destroyed.

Administrator BROWNER. Regardless of where you draw the line in terms of parties, you should certainly use—if the parties agree—an allocator to get you away from all the legal costs, to get you away from all the delays. We would absolutely agree with that, and these are the kinds of sites, I think quite frankly, where an allocator is going to be more helpful than not. We would absolutely agree with the need to try to expedite resolution of who is responsible for what share.

We also agree, and there has been much discussion about this, that there should be an orphan share fund that we should be able to put on the table, dollars from the fund to cover that part of the cleanup cost for which there is—perhaps we are exempting some parties, perhaps some parties have gone bankrupt. But that's an appropriate use of the fund because it contributes to an expedited settlement in terms of who pays what, and in ultimately getting the cleanup done.

Senator REID. Mr. Chairman, let me just close by saying that I think that the suggestion that Senator Smith had during his time of questioning is very appropriate. We have had, I think, a good discussion here today. There is going to be more before the day is out, and I think it would be extremely appropriate for the whole committee if there could be a little more work done on this so that the next time we get together, maybe there is more input, as Senator Smith has suggested.

Senator CHAFEE. Thank you very much. I agree with you.

Senator SESSIONS.

Senator SESSIONS. Mr. Chairman, I yield my time.

Thank you, Ms. Browner, for being here and for your testimony.

Administrator BROWNER. Thank you.

Senator SESSIONS. I yield my time.

Senator CHAFEE. Aren't you nice? And Senator Moynihan will be very pleased.

Senator Moynihan.

Senator MOYNIHAN. Just to start at the beginning, if I may, Ms. Browner, it was just 18 years ago that news came over the wire, as it were, about the Love Canal situation in the Niagara County, NY landfill, and a great alarm, such that the Congress enacted the Superfund bill in a post-election session. And it is two decades. The site is still not cleaned up, and I was wondering if the EPA has ever been interested enough to find out, what is the evidence of any

health problems arising from the Love Canal? Are there any epidemiological studies?

Administrator BROWNER. There were ATSDR studies on the Love Canal. Yes, there are studies done by the Agency for Toxics and Disease Registry—I may have that backwards—and we would be more than happy to provide them to you and for the record.

[Information to be supplied follows:]



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

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 DENVER, COLORADO 80202-2466

Ref: 80C

SEP 12 1997

 Honorable Wayne Allard
 United States Senate
 Washington, DC 20510-0606

Dear Senator Allard:

During the September 4, 1997 hearing on Superfund reauthorization before the Senate Committee on Environment & Public Works, you raised issues regarding two sites in Colorado which EPA Administrator Carol Browner has asked that I address on her behalf. I have not seen the letter from Colorado School of Mines President George Ansell referred to in the *Rocky Mountain News* article; but based on the reports I have received on the hearing, it appears you have been misinformed regarding EPA actions at the Colorado School of Mines Research Institute Site (CSMRI), as well as at the California Gulch Superfund Site in Leadville. I appreciate this opportunity to provide the following information. While it is quite detailed, I believe it will clarify any further misunderstanding. I also respectfully request that my letter be entered into the hearing record.

Regarding EPA as a Potentially Responsible Party (PRP) at CSMRI: The initial evidence, supplied by Colorado School of Mines (CSM) against EPA consisted of note cards with addresses of various EPA labs or offices, a card number and sometimes a one-or-two line note about the project. Most of the note cards did not have any files associated with them, and no additional information was available. The cards, themselves, did not contain sufficient information to allow EPA to track any particular project. The "projects" dates, where given, ranged from 1971 to 1983. For those projects where a file existed, we discovered that many of the projects listed on the cards represented bids by CSMRI on EPA projects, most of which EPA rejected.

Only three projects contained information indicating that CSMRI performed work for EPA. One of these required CSMRI to review and comment upon an *in situ* mining scheme proposed at a Superfund site, but did not appear to involve any actual sample analysis. Two projects involved some sampling. Our Region 8 office sent copies of documents to the involved EPA office (an EPA lab in Ada, Oklahoma) in an effort to obtain additional information; but due to our record retention policies, these documents no longer existed.

Based on the limited information that could be gleaned from the existing records, we applied EPA's Protocols for Identifying and Documenting Contributions for Colorado School of Mines Research Institute Site Potentially Responsible Parties to these projects. These are the same Protocols that were applied to the private PRPs at the Site.



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The file for one of the sampling projects, No. C80415, contained several documents. Two of the documents make reference to CSMRI's returning the samples to EPA's lab in Ada. However, because neither affirmatively states that the samples were returned, we assumed that they were not and that they were disposed of on site.

The documents indicate that 12 oil-shale samples were sent for analysis in 1980. These samples contained hazardous constituents and, under the Protocols, must be counted towards EPA's portion of liability. The analysis of three other samples sent in 1980 indicate that they did not contain any hazardous constituents and will not be counted. However, that same document (a letter) indicates that CSMRI had 24 boxes of oil-shale samples and asks whether it should ship them back to the Ada lab. No response is in the file, although the earlier memo indicates that was EPA's preference. However, since proof of off-site shipment is not available, those 24 boxes will be counted towards EPA's total. The Protocols indicate that shipments of an unknown weight will be given a value of 50 pounds. Thus, the shipment of 12 samples and the shipment of 24 boxes will be attributed to EPA at 50 pounds each.

A second project, No. C60915, indicated that samples were sent to CSMRI by the Ada lab for mineralogy studies between September 8, 1976 and April 4, 1978. No additional information was available indicating the nature of the samples, whether they contained any hazardous constituents or their volume. However, the description of the study would permit the presumption that the samples contained hazardous substances; therefore, we count it at the assumed value of 50 pounds.

This results in an EPA contribution of 150 pounds of potentially hazardous materials. Both projects occurred after 1974. Protocols indicate that, due to disposal practices of that time, non-radioactive hazardous materials may be reduced by three-quarters. This reduces EPA's contribution to 37.5 pounds. Contributors of less than 80,000 pounds at the CSMRI site were given *de minimis* settlements. Applying the standards established in the second CSMRI *de minimis* settlement to the volume of waste attributable to EPA results in a maximum payment by EPA of \$132.83. Thus, EPA could be attributed some liability, but of a *de minimis* nature. Moreover, EPA's portion is easily taken care of in the \$185,000 that we are agreeing to absorb in the final CSMRI settlement.

Regarding other federal PRPs at CSMRI being let "off the hook": On December 15, 1994, EPA issued a Unilateral Administrative Order for Removal Action to the State of Colorado, CSM, CSMRI, and fourteen private companies who were determined to be PRPs at the Site. While EPA did not include the federal PRPs in that Order, it never relinquished its, or any other party's, ability to pursue the federal PRPs for their share of response costs:

EPA issued notice letters to CSMRI PRPs on January 11, 1992 which included the Department of the Interior, Bureau of Mines. Additionally, EPA clearly stated its allegation that the Bureau of Mines was a PRP at the site in a March 9, 1994 letter to



John A. Breslin, the Acting Director of the Bureau of Mines. In that letter, EPA stated that it considered the Bureau of Mines to be an operator of the Site and refused to agree to a *de minimis* settlement. The letter also reflects EPA's continuous efforts to update information about the contribution of federal PRPs at the Site in that it increases the amount of wastes attributable to the Bureau of Mines based upon information received prior to the letter.

The federal PRPs are currently involved in negotiations with the PRP group and CSM in an effort to reach a final settlement with CSM for the reimbursement of a portion of the costs that CSM spent in responding to the Order issued by EPA. The PRP group is very near an agreement on this settlement, which includes payment by the federal PRPs. In addition, EPA has tentatively agreed to absorb a portion of its oversight costs (approximately \$185,000 as mentioned above), in an attempt to facilitate an overall settlement at the Site.

Regarding Leadville water treatment plants costs and who built them: There are two water treatment plants in Leadville. One was constructed by the U.S. Bureau of Reclamation (BOR) to treat water from the Leadville Drainage Tunnel. The BOR plant cost about \$16.5 million and its annual operations & maintenance (O & M) costs are about \$1 million.

The Resurrection/ASARCO joint venture (site PRPs) built another plant to treat water from the Yak Tunnel. The Res/ASARCO plant cost about \$12 million and has annual O & M costs of about \$1.4 million. It was constructed under an EPA Order. There are no EPA- or State of Colorado-built water treatment plants in Leadville.

Both plants are lime-precipitation plants. The BOR plant operates under a Clean Water Act discharge permit issued by the State of Colorado. The Res/ASARCO plant is operating under interim standards which are similar to the standards under which the BOR plant's permit requires it to operate.

I hope this information will be useful in your continued consideration of Superfund reauthorization. If my office may provide anything further for you, the Committee or your staff, please call Sandy Fells, Region 8 Congressional Liaison, at (303) 312-6604.

Sincerely,


William P. Yellowtail
Regional Administrator

cc: Administrator Carol Browner
Honorable John Chafee, Chairman, SEPW
Honorable Max Baucus, Ranking Minority Member, SEPW



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United States Senate
 WASHINGTON, DC 20510-0606

BANKING, HOUSING, AND
 URBAN AFFAIRS
 ENVIRONMENT AND
 PUBLIC WORKS
 INTELLIGENCE
 COMMITTEE

September 16, 1997

William P. Yellowtail
 Regional Administrator
 Environmental Protection Agency
 899 19th Street
 Suite 500
 Denver, CO 80202-2488

Dear Mr. Yellowtail;

I am in receipt of your letter of September 12th with respect to my questions to Administrator Browner on September 4th. I appreciate your response, but would like to take this opportunity to renew and expand my claim that EPA has different standards of enforcement for federal agencies as opposed to private parties and state and local governments. I will also place my letter into the hearing record.

Regarding EPA as a Potentially Responsible Party (PRP) at CSMRI: Your response would seem to be indicative of the problem that I addressed at the hearing. In this specific instance you are requiring the School of Mines to prove that the EPA is responsible for portions of cleanup while at the same time claiming that EPA destroyed the records that would show any responsibility. I would respectfully submit that if the School of Mines or any other private party or local or State government made this same claim you would at best find it unconvincing. Furthermore, given that EPA has refused to answer 104(e) requests or interview witnesses it strains credibility to claim I am the one who is misinformed. Finally, while your claim that EPA has offered \$185,000 is accurate, that settlement only relieves the private parties. It does not help the School of Mines or the State of Colorado.

I would now like to expand my claim that EPA has acted unreasonably at the School of Mines. Subsequent to the emergency removal order the State and the school disposed of the stockpile of material that been removed on the basis of the emergency order. The school then began construction, with the approval of EPA, of a women's softball field at the former stockpile storage area. Upon digging shallow trenches to install underground sprinklers for the softball field, EPA halted all construction work due to speculation that the shallow trenches had gone into presumed contamination under the liner. Immediate testing of the area showed that it was clean. Nevertheless, EPA contended that the old liner was now a cap intended to cover some

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 PHONE: 970-245-9553
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William Yellowtail
September 16, 1997
Page 2

alleged contamination below the former storage area. EPA though, failed to produce data showing contamination under the liner. Moreover, EPA alleged that the School of Mines violated the CERCLA administrative order by digging through the old liner. EPA also failed to explain how the administrative order issued to get rid of the stockpile also included capping unproved and unrelated contamination under the liner. This episode cost the School of Mines \$70,000, which they paid to avoid costly litigation.

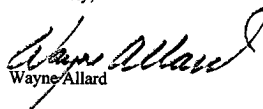
I particularly want to draw your attention to the portion of this episode which involved EPA lacking data to show there was any contamination and juxtapose that with EPA's position on their responsibility for contamination at CSMRI.

Regarding other federal PRPs at CSMRI being let "off the hook": Your response completely avoids the question and is inadequate in addressing why EPA did not enforce against the DOE or DOD among other federal agencies at the site. Your response that EPA did nothing to stop the other parties from pursuing federal agencies is irrelevant. The EPA is the, "environmental cop on the beat" and they alone are responsible for dealing with polluters. Clearly, this is an indication that EPA will not enforce in an evenhanded manner against other federal agencies.

Regarding Leadville water treatment plants and who built them: Once again let me re-emphasize my claim on this point. It is interesting to note that while the Yak tunnel, which is the responsibility of a private party, is included inside the Superfund site, the Leadville Drainage Tunnel, which is the federal government's responsibility, is outside the Superfund site. The impact of this is that the private plant is built under an administrative order and to specifications that drive up costs, while the federal plant is built under the Clean Water Act for less cost. This is despite the fact that contamination levels are roughly equivalent at both sites. Also, I would dispute the construction costs of the federal plant and ask for any data that would substantiate the construction cost claimed in your letter.

Thank you again for your response to my letter. Should you have any further questions please feel free to contact my staff at 202-224-5941.

Sincerely,


Wayne Allard

cc. Carol Browner
John Chafee
Max Baucus



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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NEW YORK, NY 10007-1868

SEP 12 1997

Honorable Daniel P. Moynihan
United States Senate
Washington, D.C. 20510

Dear Senator Moynihan:

I would like to take this opportunity to address concerns regarding the Love Canal Superfund site you raised at a recent Senate hearing with Environmental Protection Agency (EPA) Administrator Carol Browner.

First, I am pleased to inform you that all remedial cleanup activities that were necessary at the Love Canal site itself have been completed. In 1978 and 1980, as a result of residential exposure to contamination, President Carter issued two environmental Emergency Declarations for the Love Canal area. During the first Emergency Declaration, the homes immediately adjacent to the Canal itself were evacuated and subsequently demolished. Most of the land on which they stood, along with the Canal itself, are now covered by a 40-acre cap with a liner and extensive barrier drain collection system which is currently being maintained by the primary potentially responsible party (PRP), Occidental Chemical Corporation (OCC). In 1980, the second Emergency Declaration expanded the original evacuation area to include the neighborhoods surrounding the fenced 70-acre site, which includes an extensive buffer area. This area is identified as the 350-acre Emergency Declaration Area (EDA) and is divided into seven separate areas of concern. The contamination which migrated through the sewers and creeks surrounding the Love Canal site, the contaminated soils at the 93rd Street School and other contaminated areas have all been remediated.

The only remaining work required for the site is the final disposal of the Love Canal soils and sediments which are currently in storage at OCC's main plant in Niagara Falls. These materials are scheduled to be transported for treatment and disposal at a Laidlaw Environmental facility beginning in 1998. We expect that the treatment and final disposal of the contaminated materials will be completed within two-years.

In 1988, EPA completed its five-year Love Canal EDA Habitability Study. This study was conducted in partnership with the United States Department of Health and Human Services (HHS), the New York State Department of Environmental Conservation (NYSDEC) and the New York State Department of Health (NYSDOH). Subsequently, the New York State Commissioner of Health released his Decision on Habitability of the EDA. The Commissioner determined that approximately two thirds (Areas 4-7) of the EDA were suitable for residential use and one third (Areas 1-3) for commercial/industrial use.

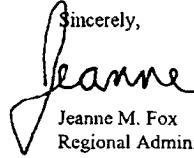
EPA is currently funding a comprehensive five-year health study of people who had resided at Love Canal. This study, currently in its second year, is being conducted by the New York State Department of Health through a cooperative agreement with the Agency for Toxic Substances and Disease Registry. This study will provide important health-related statistics. I've enclosed a fact sheet prepared by NYSDOH which discusses the study's objectives.

I've also enclosed EPA's Superfund at Work publication which provides additional details on the environmental progress made at the Love Canal site. This publication also provides information on the landmark December 1995 cost recovery settlement which EPA achieved with OCC. Overall, through the extensive technical efforts of EPA, HHS, NYSDEC, NYSDOH and the Federal Emergency Management Agency, we have successfully mitigated a serious environmental tragedy.

I respectfully request that this letter be included in the hearing record.

If you have any further questions or need additional information, please let me know or have your staff contact Peter B. Brandt, Chief, Intergovernmental Affairs Branch, at (212) 637-3657.

Sincerely,



Jeanne M. Fox
Regional Administrator

Enclosures

cc: Honorable John H. Chafee
United States Senate

Honorable Max S. Baucus
United States Senate

Love Canal, New York, Episode

Love Canal, an area of Niagara Falls, New York, was the first large residential area known to be affected by buried hazardous waste. The community had been built over an abandoned chemical waste dump, resulting in the presence of hazardous substances in households, raising concern for the impact on residents' health. The events at Love Canal had a signal effect on shaping concern for the human health consequences of hazardous waste. The enactment of CERCLA by the U.S. Congress was strongly influenced by the Love Canal episode. The public attention directed to Love Canal and ensuing legislation were both based on the potential for "hidden" toxic waste to harm human health.

Several health investigations of Love Canal residents have occurred. The first attempt to assess the effect of hazardous chemicals on Love Canal residents' health was conducted as a pilot study by the EPA, which facilitated the collection of blood samples from 36 self-selected Love Canal residents (as cited in Heath et al., 1984). Abnormal cytogenetic findings consisting of large "acentric" chromosome fragments were reported, although no differences in overall chromosome aberration frequencies were found in comparison to laboratory historical data (Picciano, 1980). The conducting laboratory was not blind to the origin of the samples, and no comparison group from Niagara Falls was utilized. Nonetheless, the findings of "abnormal chromosomes" fueled speculation that hazardous substances were causing adverse health effects in Love Canal residents. Moreover, the study gave the imprimatur of science to the residents' health concerns, and contributed to a wider news media coverage than what might have occurred in the absence of "scientific data."

Subsequent cytogenetic analyses did not confirm the 1980 findings. Investigators from the Centers for Disease Control performed cytogenetic analyses on cells in peripheral blood drawn between December 1981 and February 1982 from 46 current or past residents of the Love Canal area (Bender and Preston, 1983; Heath et al., 1984). The study's participants included 17 persons for whom cytogenetic analyses had been performed in 1980 (i.e., Picciano, 1980) and 29 persons who lived in 1978 in seven homes that abutted the canal and in which environmental surveys showed the presence of hazardous substances from the canal waste site. (The mix of current and past residents of Love Canal is unstated.) Twenty-five persons from another section of Niagara Falls comprised the comparison group. The cytogenetic samples were coded so that laboratorians were unaware of the exposure status of each person's sample. The cytogenetic results showed no increase in frequencies of either chromosomal aberrations or sister chromatid exchange, placing in question the accuracy of the Picciano findings.

A series of health investigations commenced in 1980. The prevalence of health problems in children living in the Love Canal community

was investigated under sponsorship of the Environmental Defense Fund (Paigen et al., 1985). The study population consisted of 523 Love Canal and 440 comparison children. The comparison group was selected from the Niagara Falls area. The mean age of the Love Canal children was 117.6 months and 98 months for comparison children. A questionnaire was administered to the study groups in May 1980. Interviewers questioned parents and children about children's health problems as diagnosed by a physician. Two surrogate measures of exposure were constructed: a) distance of residence from the canal, grouping homes into concentric 120 meter wide bands, and b) the proximity of homes to "wet" areas, areas filled with rubble, which created porous soil, in distinction to the generally low porosity clay of the Love Canal residential area.

The investigators found an increased prevalence of seven health problems among Love Canal children when compared with control children: seizures, learning problems, hyperactivity, eye irritation, skin rashes, abdominal pain, and incontinence. Each health problem showed evidence of a dose-response for both surrogate measures of exposure. These findings are tempered by possible recall bias of study participants, a higher level of motivation by Love Canal residents to participate in the study, and lack of actual exposure data rather than surrogate exposure indices.

Two studies of Love Canal residents' reproductive outcomes and infants' development were conducted. One study compared growth of Love Canal children with a comparison group (Paigen et al., 1987). Anthropometric measures of children, stature of parents, demographics, and health information were obtained for 493 children living near Love Canal and 428 children from census tracts matched to the Love Canal community. Children born and spending at least 75 percent of their life in the Love Canal area ($n=172$) had significantly ($p=0.004$) shorter stature for age percentile ($46.6 \pm SE 2.2$) than 404 comparison children ($53.3 \pm SE 1.4$). This difference could not be accounted for by differences in parents' stature, socioeconomic status, nutrition, birth weight, or chronic illness.

In another study, the incidence of low birth weight among white live-born infants from 1940 through 1978 was studied in various sections of the Love Canal area (Vianna and Poland, 1984). Infants who weighed 2,500 grams at birth or less were considered low birth weight. The investigators gave particular attention to the swale areas of Love Canal, because they served as drainage areas and therefore may have been areas of concentrated hazardous substances in soil.

The most compelling finding from the Vianna and Poland study is shown in Figure 5.1, which shows the 5-year moving average for percentages of low birth weights among infants born to parents residing in the swale area for the period 1940 through 1975. A significant excess of low birth weight births was found in the

historic swale area from 1940 through 1953, the period when various chemicals were dumped in the waste site. The investigators state "For the period of active dumping (that is, prior to 1954), the swale area's percentage of low birth weight births was higher than in upstate

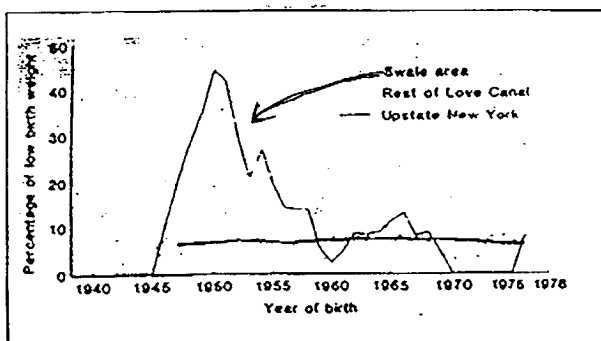


Figure 5.1. 5-Year Moving Averages for Percentages of Low Birth Weights Among Love Canal's Swale Area Infants (Vianna and Poland, 1984, with permission). New York (z test, $p < 0.0001$) and the rest of the canal (z test, $p < 0.012$). These studies of the stature and birth weight of infants born to Love Canal residents were important for validating the health concerns of the area's residents and for providing early evidence of the need to interdict releases from hazardous waste sites.

Cancer incidence in the Love Canal area was investigated by the New York State Department of Health (Janerich et al., 1981). Cancer data (i.e., number of cancer cases) from the New York Cancer Registry were examined for relation to persons' proximity to Love Canal. Standardized incidence ratios (SIRs), based on registry data and census tract population estimates, were calculated for each cancer site (e.g., liver cancer) by dividing the observed number of cancer cases in the Love Canal tract by the number expected for that census tract. Rates for all anatomical sites of cancer for the years 1966 to 1977 were ascertained, as were rates for the cancers of special interest (liver cancer, lymphoma, leukemia) for the period 1955 to 1965. Age- and sex-specific cancer incidence rates were calculated for 10 major cancer sites and five age groups for each of the 25 census tracts in the city of Niagara Falls; one tract included the Love Canal area. The analysis showed no cancer rate to be consistently elevated in comparison with state-wide cancer rates. The investigators noted that the effects of socioeconomic factors, air pollution levels, and cigarette smoking could not be assessed in their study design. They also observe that uncertain latency periods for the cancers investigated could have obscured the study's findings.

In June 1994, the State of New York and the Occidental Chemical Corporation settled legal claims. The chemical company agreed to pay the State \$98 million and to assume the continuing operation and maintenance of remediation activities at the Love Canal site (Hernan, 1994). A retrospective health investigation of the former Love Canal residents is scheduled for initiation in 1997 as part of the final settlement between the waste site's Potentially Responsible Parties and the federal and New York state governments.

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New York State Department of Health

Love Canal Health Study

August 1997

Summary

The New York State Department of Health has been awarded a \$3 million federal grant for a follow-up health study of people who lived near Love Canal between 1940 and 1978. The Love Canal health study will:

- assess illness and mortality trends since 1978, when the first health studies were done; and
- look at birth weight, prematurity and other effects among the children and grandchildren of people who lived near the Love Canal.

Background

In 1978, the Department of Health learned that Love Canal chemicals had surfaced at the site. The site was located in the midst of a residential neighborhood and was accessible to residents. Canal chemicals were also found in some nearby yards and homes. Most of the families moved away from the Canal area as state and federal funds were provided to buy their homes. Homes on both sides of the two streets circling the canal were demolished to make room for a containment system, except for a few homes at the north end of the landfill area. Most of the homes beyond the first two streets were bought by the government and stayed vacant until containment, clean-up and habitability criteria were set and satisfied. Scientists who reviewed resettlement activities recommended that we determine whether Love Canal residents experienced higher rates of death, cancer or birth problems than is seen in other similar communities, and decide whether other studies besides these are appropriate. The study results will not affect resettlement or habitability activities now underway at the Canal since remedial work has been done to stop people from being exposed to chemicals.

In 1978, as part of the early response to Love Canal contamination, we interviewed adults living in the area about their health status and recorded names and birth dates of their children. These individuals and their children are included in the Department's Love Canal Registry. The people in the registry and their descendants will be included in the study.

Study Plan

The study will look at whether residents who lived near the Love Canal have experienced more of certain health problems than people who did not live near the Canal. The first step is to locate those who participated in our earlier studies and add any former residents (1978 or earlier) who contact us to participate. New residents to the area will not be included in the study; they are not being exposed to Love Canal chemicals. Although we will not search for new people to add to the registry, we will update some health records about participants who were children in 1978 and add the names of grandchildren of the Love Canal registrants. Using these names and addresses, we can look at health information routinely reported to the

Department:

- review cancer registry data to compare cancer rates;
- search birth certificates and the congenital malformations registry;
- review death certificate information for death rates; and
- look at any patterns in the causes of death.

FACT SHEET

Much of this work is done by linking databases and using statistical tests to determine if the Love Canal population has a different rate of adverse health effects when compared to other similar populations. If the death certificate research suggests that the rate of some effects are unusual and should be explored further, we would look more carefully at these effects.

Part of the study involves reviewing the environmental information to assess its usefulness for the study. While we can't go backward in time to measure chemical levels that once existed, reports of environmental sampling can help determine which areas may have had higher levels than others at the time of sampling. The data are expected to be useful in rating the likelihood that residents were exposed to Canal chemicals (high, moderate, low), depending upon their former address. This rating system will be superimposed on the health effects information to see if the residents who were less likely to be exposed had fewer adverse health effects than the residents more likely to have been exposed.

Finally, we plan to interview registrants in the higher likelihood of exposure categories by telephone. We will ask about certain health effects that might be related to Love Canal chemicals but aren't reported to existing Departmental databases.

The research will take at least five years. While no study can provide answers about all health risks, sharing the results with former residents and their families might be helpful. If the group of former residents did not experience different health outcomes than similar groups of people, the study results may offer some assurance. If differences are found, advice to individuals and their physicians may lead to early diagnosis and treatment. If the results are inconclusive, they may still point the way for future research and we will not have missed the opportunity to study possible health effects from Love Canal exposure.

Peer Review and Public Outreach

A panel of independent scientists with expertise in epidemiology, environmental health, statistics, toxicology and occupational medicine will be asked to provide technical advice at key points in the study. The Department will appoint the scientists as follows: three will be chosen from scientists nominated by the community, Occidental Chemical Corporation will be invited to nominate candidates for a possible ninth seat, and we will select the other five. We will ask the panel for guidance on issues such as the best method to group residents according to their potential past exposures to Canal chemicals and whether any medical tests would indicate exposure. The NYS Department of Environmental Conservation, the US Environmental Protection Agency and the US Agency for Toxic Substances and Disease Registry will be asked to provide technical suggestions. Besides helping to choose the panel, community members can be involved in the study by contacting us with questions or comments. We may also hold public meetings to inform you about the status of the study, answer your questions and hear your suggestions as we go along.

Further Information

For more information about the health study, or if you have comments or concerns, contact the Health Liaison Program at (800) 458-1158, ext. 6402 or in writing at NYS Health Department, Health Liaison Program, 2 University Place, Albany, New York 12203. Members of the press should contact our Public Affairs Group at (518) 474-7354.

Senator MOYNIHAN. What's the agency?

Administrator BROWNER. ATSDR, Agency for Toxic Substances Disease Registry. They are the people who are responsible at sites for evaluating the health consequences—

Senator MOYNIHAN. What have they found? You've got a lot of people behind you that you can ask.

[Laughter.]

Administrator BROWNER. At Love Canal there were studies that monitored birth weights after cleanup, and we'd be more than happy to provide those to you. I think there were other studies.

Senator MOYNIHAN. What have they found?

Administrator BROWNER. I think they did find—I'm doing this from memory now—

Senator MOYNIHAN. What about all those fellows back there?

Administrator BROWNER. Well, I don't know that any of them are Love Canal experts, or ATSDR—maybe there is someone here from ATSDR and I'm not aware. I don't think there is.

Senator MOYNIHAN. Might I suggest, quite seriously, that from the outset there has been an appalling absence of controlled inquiry. If ever you had a natural experiment in toxic waste, it was the Love Canal, built on a grid, in which you have persons who lived 100 yards away, 200 yards away, 300 yards away, for 40 years, and 30 years, and 50 years, and all that. And to my knowledge, Mr. Chairman, we have not learned a thing.

Administrator BROWNER. With all due respect, Senator, I think there are studies that showed that there were low-birth weights—

Senator MOYNIHAN. You think there were?

Administrator BROWNER. We would be more than happy to provide them to you. I do know that the State of New York—there are studies on low-birth weights. The State of New York has also been involved, and we would be more than happy to get this for you, in conducting a long-term study of the health effects and following the children who are now adults, in many instances, the people who lived at this site, in terms of the long-term health consequences.

Senator MOYNIHAN. Could I suggest that it would be no harm for the EPA to know this subject? This is where this legislation begins.

Administrator BROWNER. Well, we are very familiar with the health effects associated with exposure. You had asked about a particular site and I wanted to make sure that I had spoken to the types of scientific studies that may have been done at that site. When you look at toxic waste sites across the country and you look at the studies—and there are many, many, many studies that have been done—unfortunately, what the studies show is that there have been very real health effects for people in those communities, very real—

Senator MOYNIHAN. Is it unfortunate to have learned that?

Administrator BROWNER. I wasn't suggesting that it was unfortunate to learn that. I was suggesting that it was unfortunate for the people in the communities.

Senator MOYNIHAN. You have another note by your left hand.

[Laughter.]

Administrator BROWNER. I've already given you this. I knew this.

[Laughter.]

Senator MOYNIHAN. All right. Let's hear from you, if we may.

Administrator BROWNER. Yes, certainly, and we will also contact the State of New York about their long-term study.

Senator MOYNIHAN. Fine. Thank you.

Senator BAUCUS. Mr. Chairman, quickly, if I might, I do join my colleague from New York in urging EPA to look into it, as discussed. But maybe even with all the good work that the EPA has done in my State of Montana, this is the "Golf Journal," a major golf magazine, and this is a golf course. Montana is the largest Superfund—

Senator MOYNIHAN. If that's a golf course, where's the President?

[Laughter.]

Senator BAUCUS. Senator, I must say that that's a very fair question, because this golf course is—actually, it sits on top of a former Superfund site in Montana, and I want to thank Administrator Browner for working very creatively to figure out a way to allow this course. It was designed by Jack Nicklaus, and I asked the President to come out to play when Jack Nicklaus, and I might say it's one of the finer courses in the country, a former Superfund site. The President did not accept my invitation to play.

[Laughter.]

Administrator BROWNER. A mining site, I might add, which is one of the most difficult.

Senator CHAFEE. All right.

Madam Administrator, we thank you very much and we appreciate your coming.

Now I'm going to do something totally arbitrary. If Governor Nelson and Mayor Perron would please come up, we would have both of those witnesses.

I would ask Ms. Wilma Subra, who is here from Louisiana, if she also would come up. And Mr. Gordon Johnson from New York.

Now, it may well be—it is my belief that the rest of the witnesses are here locally, and if we can, we'll schedule another hearing, but it just does not appear that we will be able to get everybody on. I see Ms. Florini here, and I think you are available, are you not? And Ms. Eckerly.

Now, we have to take seats quickly, please, because we are operating under a deadline.

Is Ms. Subra here? If you would sit down. You have come from Louisiana, right?

Ms. SUBRA. Yes, sir.

Senator CHAFEE. Well, we're going to give you a hearing.

Ms. SUBRA. Thank you.

Senator CHAFEE. And Mr. Johnson from New York.

Now, am I correct? Mr. Fields, have you come from Chicago?

[Voice, "He left the room."]

Senator CHAFEE. All right. We lost him. All right.

Now we are going to proceed with Governor Nelson.

Governor, if you could keep your statement—what we are really interested in is what you propose, what your suggestions are for us, what you think we ought to do. And we appreciate your coming, and I know there's some back-and-forth and you made particular arrangements to come here, so we appreciate it.

**STATEMENT OF HON. E. BENJAMIN NELSON, GOVERNOR,
STATE OF NEBRASKA, ON BEHALF OF THE NATIONAL GOV-
ERNORS' ASSOCIATION**

Governor NELSON. Thank you very much, Mr. Chairman, members of the committee. As Senator Chafee mentioned, my name is Ben Nelson and I am Governor of the State of Nebraska and chair of the National Governors' Association's Committee on Natural Resources. I have submitted to you a lengthier statement for the record, and I will try to summarize my remarks as briefly as I can.

It is important to point out that my testimony is presented on behalf of the National Governors' Association. It has also been developed in close consultation with the Environmental Council of States and the Association of State and Territorial Solid Waste Management Officials, which represents State officials who manage the Superfund program on a daily basis.

The States have a strong interest in this Superfund reform, and I believe that a variety of changes are needed to improve the Superfund program's ability to clean up the Nation's worst hazardous waste sites quickly and efficiently. So we commend Environmental Protection Agency Administrator Carol Browner for many of the administrative reforms that she has developed for this program. But we still believe that legislation is required, and if I leave you with one message today, let it be our hope that the agreement to work together in a bipartisan basis will continue and that you have the support of the Governors on a bipartisan basis to commit to do everything that we can to assist in this effort so that we can continue to work cooperatively, both with the majority and the minority parties, to develop a final bill that enjoys both bipartisan support and Presidential signature.

I want to commend you for developing a very good starting point for the kind of bipartisan negotiations that are going to be required here. I know that there are some important differences that remain, but we hope that the chairman's mark is a significant step toward resolving those concerns. Given the discussion and the statement by Administrator Browner, I remain confident that we will be able to work through these differences.

The overall assessment by the National Governors' Association really just suggests a few areas where we think that some improvements could be made.

As you know, one of our major concerns has to do with the clean-up of the so-called brownfields sites. The Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties, and if we could all be as successful as Senator Baucus in Montana has been in conjunction with that golf course, we would all be very, very happy. We commend the committee for including brownfields language in the bill.

We cannot overemphasize the importance of State voluntary cleanup programs in contributing to the Nation's hazardous waste cleanup goals. States are responsible for cleanup at the tens of thousands of sites that are not listed on the National Priority List. In order to address these sites, many States have already developed highly successful voluntary cleanup programs that have enabled sites to be remediated quickly, and with minimal Govern-

ment involvement. It is important that the legislation support and encourage these successful programs by providing clear incentives and the much talked-about flexibility.

Frankly, we feel an increased need for congressional direction because the guidance on State voluntary programs that EPA is about to finalize doesn't seem to afford us the necessary and appropriate flexibility. We intend to talk to Administrator Browner further on this to see if there is an area where we can come to agreement.

We also strongly support the provisions in your mark that encourage potentially responsible parties and prospective purchasers to voluntarily clean up sites and to reuse and redevelop contaminated properties. Among the most important incentives is a release from Federal liability at a site that has been addressed by the State. Your chairman's mark takes an important step in that direction. I would note, however, that while the draft would preclude Federal enforcement for sites in a State voluntary cleanup program, it does not provide a release from Federal liability. We believe that this would leave the PRPs, the potentially responsible parties, vulnerable to third-party suits, and we ask that, to the extent possible, you clearly waive Federal liability for a site addressed under a State program.

And with respect to the State role title, the Governors strongly support the efforts to provide us with options to enhance the role of States in this program. We appreciate the inclusion of options for authorization, expedited authorization, delegation, and limited delegation by agreement in the draft. We feel that this allows for maximum flexibility to meet State needs and objectives.

We especially support the authorization provisions that allow States to operate their own programs in lieu of the Federal program. Where States are authorized to operate programs in lieu of the Federal programs, States should receive adequate Federal financial support at no less than EPA would be supported for those efforts.

But the States cannot support provisions allowing the EPA to withdraw delegation on a site-by-site basis. EPA should periodically review State performance instead of involving itself in site-by-site oversight. In other words, evaluate the program being adopted and the overall performance by a State with respect to all the sites rather than picking and choosing on a site-by-site basis for oversight.

With respect to the selection of remedy, we support changes that result in what we think will be more cost-effective cleanups, a simpler, more streamlined process for selecting remedies and a more results-oriented approach. The bill moves significantly in this direction.

Many of these reforms seem to us to be codifications and improvements of EPA's previous administrative reforms, and we applaud that.

One of the most important issues in selecting a cleanup remedy is allowing State-applicable standards to apply at Federal cleanups, as they do at State sites. We greatly appreciate and strongly support the provisions of the bill that allow State-applicable standards and promulgated, relevant, and appropriate requirements to apply to all site cleanups, Federal and private as well.

Another important remedy selection issue concerns the importance of considering different types of land uses when determining cleanup standards, so we applaud the inclusion of provisions in your bill that provide for State and local control in making determinations on foreseeable land uses.

In addition, we would like to ensure that land use decisions are not second-guessed by EPA.

I can't talk about remedy selection without mentioning groundwater, because in Nebraska groundwater provides the great majority of our drinking water supplies, about 90 percent, and we are blessed with very clean groundwater resources. We want to keep it that way, so we believe that groundwater is a critical resource that needs to be protected. The use of State-applicable standards and the opportunity for State and local authorities to determine which groundwater is actually suitable for drinking are essential during the remedy selection process. We do need to ensure that any groundwater provision are appropriately workable and flexible. Therefore, more State involvement is important.

And finally, as you know, liability reform is one of the most difficult issues in the bill. The Governors recognize that the current liability system does some things very well and provides some important benefits, but it also carries some unfairness and contributes to unacceptably high transaction costs. In general, we support the elimination of liability for *de minimis* and *de micromus* parties, and believe the liability of municipalities also needs to be addressed. But we question broader releases of liability for other categories of responsible parties. In any case, we would like to see convincing analysis that any changes in the liability scheme will provide adequate assurance in funding so that sites will continue to be cleaned up and so that there will be no cost shifts to the States. The downloading of that cost onto the States is not going to be an adequate remedy, and we would certainly oppose that.

We also oppose the apparent preemption of State liability laws when a facility has been released from Federal liability. Preemption of State liability laws at the NPL sites effectively creates an inequitable situation in States because it creates an inconsistency in an application of State law at sites throughout the States. We want to avoid creating a scenario where there is a demand by potentially responsible parties to be added to the NPL, the Priority List, because the Federal liability scheme is more favorable. We can see that that could happen.

With respect to Federal facilities, the Governors urge and support that the legislation will ensure a strong State role in the oversight of Federal facility cleanups. The States appreciate the provisions in the chairman's mark allowing EPA to transfer responsibility for federally-owned facilities to States, and we question why this is more limited than the authority that States can exercise at private sites. We urge you to include a clear waiver of sovereign immunity for Federal Superfund sites, to ensure that State applicable standards apply to Federal sites, and that a double standard doesn't exist for Federal facilities, at a standard that could be substantially lower.

We have enough concerns that have been raised about the States having a race to the bottom when it comes to dealing with these

issues. We don't want to meet the Federal Government on the way to the bottom.

[Laughter.]

Governor NELSON. As you know, the natural resource damage provisions of Superfund are also controversial. Although some reform is warranted, the program's integrity needs to be maintained, and I want to thank the committee for including the provision that protects existing claims and lawsuits. I know it's extremely important to my colleague and the vice chair of our committee, Governor Marc Racicot of Montana, who serves as vice chair of our committee.

I also want to mention how strongly we support the provision to require the concurrence of the Governor of the State in which a site is located before it may be added to the NPL. We fought long and hard to have this vitally important provision included in legislative proposals. We are also worried about the placing of an arbitrary cap on the number of sites that can be added to the NPL. We think that will not be an appropriate limitation that could be placed on new listings.

Well, in conclusion let me say that I really appreciate this opportunity to be here, and I thank you for your hard work on this. I know, Mr. Chairman, that it is a difficult area on which to bring together general agreement, but I commend you for your efforts and offer to continue in any way we can to support your efforts to bridge the gap and to bring parties together in any way that we possibly can.

Senator CHAFEE. Well, Governor, I want to thank you very much because you've been very specific in your recommendations here. You get into a lot of matters that are of concern to us. For instance, something that is not a burning issue, the so-called Record of Decisions, the RODs, you touch on that provision. Your statement has been very helpful.

I didn't get a chance to apologize enough to those witnesses who came from, I believe, around in the Washington area that we weren't able to reach, and I want to thank you all. We're going to try to get all of you whom we missed back here again. Mr. Fields, I know that you very kindly suggested that you could come back from Philadelphia, if needed.

Now we will hear from Mayor Perron from Elkhart, IN. We welcome you on behalf of the U.S. Conference of Mayors.

STATEMENT OF HON. JAMES P. PERRON, MAYOR, ELKHART, IN., ON BEHALF OF THE U.S. CONFERENCE OF MAYORS

Mayor PERRON. Good afternoon, Mr. Chairman and members of the committee. I am Jim Perron, the mayor of Elkhart, IN. I am pleased to be here this afternoon, and thank you for your leadership in the development of S. 8 and in moving the legislative process forward with this hearing.

Today I am testifying on behalf of the U.S. Conference of Mayors, which represents over 1,100 cities with populations of 30,000 or more.

Being Mayor of Elkhart for nearly 15 years has allowed me the opportunity to deal directly with a variety of Superfund issues, ranging from brownfield redevelopment to remediation of a

Superfund site that essentially covered our entire drinking water system.

Mr. Chairman, the Nation's mayors believe that Superfund has been successful in meeting three national policy objectives: a dramatic reduction in the use of hazardous materials by industry; the ability of our Nation to respond to emergency spills and contamination; and the creation of a much safer national hazardous waste management system. These are major accomplishments of the Superfund program, and we want to acknowledge them from the outset. That's the best of Superfund.

Alongside these tremendous public benefits are the unintended negative consequences of the Superfund program, the fact that the private sector will not invest in hundreds of thousands of non-NPL contaminated sites for fear of being caught in the Superfund liability web. These so-called brownfields were not caused by local governments or the citizens who now must live with the consequences of lost jobs and an eroded tax base in abandoned or underutilized properties that denigrate communities.

In a Conference of Mayors survey, we found in only 39 cities, the loss of local tax revenues from local brownfields ranged from \$121 million to \$386 million annually.

Finally, brownfields lead to additional negative environmental effects by encouraging urban sprawl in eating up prime farmland, forest, and open spaces.

I would like to mention here, Mr. Chairman, that the State of Indiana has moved forward through a legislative committee—a task force to which I was just recently appointed by Governor O'Bannon—which is an Indiana Farmlands Preservation Task Force, to try to address this issue, and I do believe the brownfields issue is one area that we will be discussing.

I should say that in addition, the Superfund program has made the cleanup of National Priority List sites expensive, bureaucratic, time-consuming, and litigious. We want to commend the Administrator and the agency for the administrative reforms to improve the Superfund program, but we believe these will not be enough to structurally reform the program and put it on a sound footing for the future.

Turning specifically to the proposals that we were asked to address for today's hearing, I would like to start by saying that it is extremely important for Title I on brownfields to provide local governments the greatest flexibility possible in the use of brownfield site assessment, characterization, and cleanup funds.

The definition of brownfields should not require the site to currently have an abandoned, idle, or underused facility. Many former industrial and commercial sites have been razed, but still contain contamination that should qualify this site as a brownfield.

Likewise, the list of exclusions in the definition of brownfields should be significantly eliminated so that local governments have the flexibility to submit brownfield sites that are local priorities. For example, the current list of exclusions would disqualify sites where an emergency response action has been taken. Many emergency response actions remove the immediate emergency but do not leave the property in a condition that would allow the private

sector to invest in it. Local governments should have the flexibility to include them. A similar rationale holds for other exclusions.

On the issue of funding, we believe that the Superfund program which helped to create brownfields should devote at least 10 percent of its funding annually to the brownfield cleanup program. We ask the committee to include annual authorization levels in S. 8 to reflect such a level. We have outlined in our written remarks why this funding level is justified.

We are also extremely pleased that, with the Administration's support, the House and Senate have devoted increased funding for fiscal year 1998 to EPA's brownfields program. We want to thank Senator Bond for his leadership in that arena.

Mr. Chairman, the policy which the mayors adopted in San Francisco at our annual meeting this year calls for Superfund reauthorization to include provisions that expedite the cleanup of co-disposal landfill sites by providing liability protections for generators, transporters, and arrangers of municipal solid waste. The provisions of S. 8 clearly begin that process and go a long way toward that end. We are concerned, however, that the bill does not provide generators and transporters of municipal solid waste protection from third-party contribution lawsuits, for cleanup costs incurred prior to date of enactment at co-disposal sites. Because we believe that Congress never intended municipal solid waste and sewage sludge to be considered hazardous under CERCLA, we believe that some form of liability relief should also be extended to pre-enactment costs.

We want to remind the committee that numerous studies have indicated that municipal solid waste contains less than $\frac{1}{2}$ of 1 percent of toxic materials.

Mr. Chairman, we also want to acknowledge and commend the Administrator and the agency for the recent announcement of administrative reforms governing municipal liability for co-disposal sites. The most important principle set forth in EPA's policy is that municipal solid waste has virtually never been the cause of listing co-disposal sites under this proposal.

Finally, we agree with the chairman's mark, which reflects the view that the toxicity of municipal solid waste is so low that the transaction costs of collecting funds for response costs incurred after the date of enactment warrant a transfer of liability from individual parties to orphan share.

Mr. Chairman, I am also very pleased to note that on Tuesday of this week President Clinton nominated one of our colleagues, Mayor Cardell Cooper of East Orange, NJ, to be the Assistant Administrator of EPA for Solid Waste and Emergency Response. I am aware that this committee has the formal responsibility to advise and consent on this nomination, as does the full Senate. Mayor Cooper has been one of the great leaders among the mayors in this country on a very broad range of issues, including those concerning Superfund, brownfields, and environmental cleanup. He will do an outstanding job in moving these programs forward and in strengthening the partnership among the cities, the Congress, the Administration, and the private sector, to bring about the achievement that we need in these areas. I hope that you will give swift approval to this nomination at the appropriate time.

Mr. Chairman, it is almost impossible to talk about brownfields and Superfund reform in 5 minutes. Our written comments cover many other points.

Let me add that Mayor Helmke of Fort Wayne—he is the president of the U.S. Conference of Mayors—is meeting as we speak in Rhode Island with the co-chairs of our Brownfields Task Force, and will undoubtedly have further input into our comments on S. 8.

We encourage the Senate to move forward with Superfund reform and reach a bipartisan agreement on a bill. We believe that S. 8 is a good starting point for those discussions, and we stand ready to be of any assistance.

I would be pleased to answer any questions that you may have at the appropriate time.

Senator CHAFEE. Mayor, thank you very much.

It has come to my attention that some here don't understand why we are under the gun at having to stop at 4:30. That's not something the committee wishes to do. I would stay here and hear every witness. This came about because the Democratic leadership is invoking the Senate rules which permit them to say that no committee can meet after 2 o'clock when the Senate is in session. The majority leader, in order to give us time here to get on with what we could, put the Senate into recess from, I presume, 2 o'clock until 4:30, but when 4:30 comes, it will then be obviously after 2 o'clock, and so this committee cannot remain in session.

So again I want to apologize. We will take all the statements of those whom we were not able to reach, and any of the witnesses who had something further to add can submit further statements for the record, and we will keep the record open for 1 week.

Senator BAUCUS. Mr. Chairman, if I might add, it is regrettable that we cannot continue to meet, but I think it would be unfair to characterize it as the Democrats that are holding us up. The fact of the matter is that this is an internal Senate matter having to do with still another matter which we have to resolve, and this is regrettable, but that's why we are not able to meet longer. It's a bipartisan problem that has caused this delay.

[Laughter.]

Senator CHAFEE. No one will argue with my bipartisan credentials—

[Laughter.]

Senator CHAFEE [continuing]. But this is not a bipartisan issue. The committee is not able to meet because the Democratic leader invoked the rules.

Senator BAUCUS. Well, we all know why he invoked them.

Senator CHAFEE. Well, that's a separate subject.

[Laughter.]

Senator CHAFEE. Let's not explore that any more.

Now, we are delighted to have Ms. Subra here, who has come from New Iberia, LA. We are delighted to have you here, and if you could present your statement in some 5 minutes, then we will have Mr. Johnson, who is here from New York on behalf of the National Association of Attorneys General, and then we'll have questions of the entire panel.

Can you stay, Governor?

Governor NELSON. Yes.

Senator CHAFEE. OK.
Ms. Subra.

**STATEMENT OF WILMA SUBRA, PRESIDENT, SUBRA COMPANY,
NEW IBERIA, LA**

Ms. SUBRA. Thank you. I would like to thank the committee for giving us this opportunity to testify.

I have been involved in Superfund issues since Superfund began, working with citizens who live around these hazardous waste sites. I have also served as the technical advisor on the National Commission on Superfund, and I provide technical assistance to citizens' groups at eight Superfund sites through the TAG process.

Karen Florini will present a lot of the issues that we have concerns about. We didn't want to duplicate, so I just want to say that I am in support of the issues that she will present to you at a later time.

I would like to tell you why I have a problem with State delegation and give you an example. The transfer of authority to States in order to perform Superfund programs may be appropriate for a few States, but the wholesale transfer of Superfund programs to a large number of States will have a negative impact on the overall program. An example of a State that should not be granted Superfund authority is the State of Louisiana. The State lacks the financial resources, personnel, and political will to even implement their own State program. The majority of the NPL sites in the State of Louisiana were submitted by citizens' groups, not by the State. The State didn't want the stigma of having hazardous waste sites being on the Federal list. In 1995, the State Legislature removed almost all the funding and personnel from the State program.

The current State program only has sufficient financial resources to, No. 1, perform small emergency removal actions when a midnight dumper drops barrels along the side of the road, and No. 2, to provide oversight at the 14 Superfund sites in the State. There are little or no resources to evaluate the more than 500 potential sites, or to perform remedial activities at confirmed sites. During the past 2 fiscal years, 57 confirmed hazardous waste sites sit waiting for cleanup when and if resources become available. When sites pose an imminent and substantial threat, the EPA has to step in to perform financial and emergency removal actions for the State.

The most recent example of the need for Federal resources and manpower was the Broussard Chemical Company site in Vermilion Parish. The EPA has spent more than \$2.5 million in investigating, removing, and disposing at six separate locations operated by Broussard Chemical. A number of additional sites operated by the same person are currently being investigated further by EPA because of lack of resources on the part of the State.

If it were not for the EPA and the financial resources of the potentially responsible parties, little progress would be made in the State of Louisiana in addressing hazardous waste issues.

At PRP-funded sites, the State is still responsible for oversight. The lack of personnel resources has a major impact on that process. In Louisiana, the lack of sufficient technical resources has resulted in the State missing critical technical issues on the Shell-Bayou

Trepagnier site. One of the issues missed involved the diluting of the contaminant levels by the PRP by including the control samples in both the site samples and the control samples, thus lower contaminant concentrations were evaluated for that site.

The State of Louisiana and many other States that lack financial and personnel resources should not even be given the opportunity to request State delegation or feel pushed by Congress into having to accept the delegation of the Superfund program.

In the treatment of hot spots, the preference for permanence in Superfund remedies has been modified to only treatment of hot spots. Attempts are made to justify the appropriateness of only treating these hot spots by including containment for the other hazardous substances. Reliance on containment is not a permanent remedy and merely puts off addressing the hazardous contamination until a future date. During that period when containment fails, public health and the environment will be impacted. The community members in the area of the site will once again be exposed to the hazardous substances and bear the burden of health impacts. The preference for permanence should be expanded to include a larger portion of the hazardous contaminants than just the hot spots.

A containment remedy is being proposed for the Agriculture Street Landfill Superfund site in New Orleans. The landfill was operated by the city of New Orleans from 1909 to 1965. The city then developed 47 acres of the 95-acre site on top of the landfill—

Senator CHAFEE. Ms. Subra, I tell you, this is kind of a specific thing which we have in our record. Maybe you could move on to your next principal point. I want to make sure we can reach Mr. Johnson.

Ms. SUBRA. OK.

On the delisting, you are doing it too early. The initiation of a delisting process after construction completion, rather than after remedy implementation, is totally inappropriate. We have a site in Vermilion Parish where the remedy is being implemented. It was solidification after biotreatment. As it turned out, the Portland cement was contaminated with chromium, and when they solidified the waste, the chromium leached, and now you have a larger expanse. There are needs to go back in and look at the remedy. If you have delisted the site, you have cut the public out of the process, you have removed the TAG grant. After construction is much too early in the process.

In the State concurrence, in the State of Louisiana the Governor has only concurred at one site. That site was going to be an add-on to one that already had an incinerator, already had local contractors. He did the concurrence because he wanted the contractors to keep working. At the other sites, in fact, contamination of the fish and the organisms that live in the estuaries resulted because he did not concur and nothing is happening at those sites.

The limit on new sites will merely put the burden back on the States, which don't have enough money to address the sites. The limit on the number of new sites has to be increased dramatically or removed entirely.

We would be happy to continue this process of talking and dialoging about the things that we have a problem with.

I would like to thank you for the opportunity to provide this input.

Senator CHAFEE. Well, thank you very much, and again we want to thank you for coming all the way. I am curious as to what Governor Nelson will have to say when we get to the questions.

Mr. Johnson from the State of New York. If you will go through it, and if you could summarize your statement, we have your regular statement for the record because we want to be able to get in a few questions.

STATEMENT OF GORDON J. JOHNSON, DEPUTY BUREAU CHIEF, ENVIRONMENTAL PROTECTION BUREAU, NEW YORK STATE ATTORNEY GENERAL'S OFFICE, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. JOHNSON. Thank you very much, Senator Chafee. I am the Deputy Bureau Chief of the Environmental Protection Bureau in the office of New York Attorney General Dennis Vacco. I very much appreciate the opportunity to appear before the committee, and I thank you, Senator Chafee and Senator Baucus, as well as Senator Moynihan from New York, for giving me time to present comments with respect to the natural resource damage provisions of the bill.

I am appearing today on behalf of my office and on behalf of the National Association of Attorneys General, NAAG. My office has handled or is now counsel in more than 25 major natural resource damage cases arising from the release of hazardous substances or petroleum products.

At its summer meeting in late June of this year, the sole resolution adopted by NAAG addressed Superfund reauthorization. A copy is attached to my written testimony. The resolution also addresses directly the natural resource damage issues which are the subject of this panel. My Attorney General Vacco was among the group of bipartisan sponsors of that resolution.

The resolution arose from the recognition by the State Attorneys General of the critical importance of the Superfund program in ensuring protection of public health and the environment from releases of hazardous substances at thousands of sites across the country. They also know firsthand the problems with the statutory scheme, and the need to limit transaction costs and streamline certain processes required by Superfund today. In particular, the Attorneys General want to make the task of assessing natural resource damages and restoring injured or destroyed resources less complicated, and reduce the amount of litigation that may result when trying to accomplish those goals. In my brief oral remarks today I will address some of the more significant issues.

First, judicial review. NAAG urges Congress to clarify that in any legal proceeding, the restoration decisions of a trustee should be reviewed on the administrative record, and be upheld unless arbitrary and capricious. S.8, as introduced, contained provisions in section 702 regarding the administrative record that appeared to accomplish that goal. The chairman's mark retained the provision regarding the establishment of the administrative record, but removed language in the public participation section providing that judicial review of the trustee's restoration plan would be on the

record. S. 8 also removed the rebuttable presumption provided in current law to a trustee who adheres to the regulations.

The deletion of the judicial review provision is unfortunate and unwise, and likely will lead to greater litigation, increased expense, and secretive and duplicative assessments. Unless the selection of a plan and the assessment which led to that selection is entitled to the usual administrative presumption of correctness, no trustee could afford to conduct an assessment and select a plan on an open record with full public input, knowing that responsible parties would not be bound in any fashion by that determination.

Senator CHAFEE. Then you have some suggestions of language there. Why don't you move to your statute of limitations now, could you?

Mr. JOHNSON. Fine.

The Attorneys General also ask that CERCLA be amended to provide that claims for natural resource damages be brought within 3 years of the completion of a damage assessment. Currently, CERCLA has a very complicated, two-prong statute of limitations. These provisions often put often put a trustee in a difficult position and result in much unnecessary litigation. The trustee may have to bring suit before he or she has sufficient information to determine the scope of the injury or to quantify damages, often even before an RI/FS is completed. We urge Congress to adopt a statute similar to that governing cases arising from the release of petroleum products under the Oil Pollution Act of 1990.

The third issue I would address is the availability of Superfund moneys for assessment. When CERCLA was amended in 1986, Congress provided that the trust fund could be used by State and Federal trustees to conduct damage assessments, recognizing in particular that many State trustees lacked the funds to pay for the assessments themselves. In conference, that language was effectively removed through amendments to the IRS Code. NAAG has long asked that the conflict between the IRS Code and CERCLA be eliminated so that State trustees can draw on the fund to conduct assessments, which they presently can do to conduct RI/FSs. This will also promote the integration of the NRD program with the cleanup program and lead to greater efficiencies and better cleanups.

Use of reliable assessment methodologies is another aspect addressed in the resolution. Just as Congress does not direct EPA to use only certain scientific methodologies in the changing and developing area of remedial science, NAAG believes that Congress should retain the ability of trustees to recover damages based on any reliable methodology. S. 8, however, provides that assessments may be conducted only in accordance with regulations not yet promulgated by the President, and forbids the use of one methodology, the admittedly controversial "contingent valuation" methodology, in the assessment process.

Senator CHAFEE. Why don't you move to the liability cap and the recovery of costs?

Mr. JOHNSON. We are pleased with respect to the liability cap—

Senator CHAFEE. That's what I wanted you to hear.

[Laughter.]

Senator CHAFEE. That's very good. Now go to the next one.

[Laughter.]

Mr. JOHNSON. Recovery of enforcement and oversight costs, to summarize that, S. 8 is silent on whether enforcement costs and oversight costs by State trustees can be collected from responsible parties as part of the process of conducting an assessment and implementing it. We believe they should.

The NAAG resolution is consistent with the general and uncontroversial policy that persons responsible for the release of hazardous substances have an obligation to make the public whole in the event there is an injury to our natural resources. Well over 100 years ago, in cases on the abatement of nuisances and the public trust doctrine, the courts made clear several bedrock principles. The States and the Federal Government are trustees for the people, and their trust corpus includes this Nation's glorious natural resources.

Senator CHAFEE. OK. Let's see what else we have here.

All right. I would be interested in your "injury before 1980," how you handle that one.

Mr. JOHNSON. The language of S. 8, as originally introduced, substituted language in current CERCLA law, substituting the word "injury" for the word "damages." Under current law, if damages continued after 1980 and the public was harmed after 1980, a natural resource damage case may be brought.

S. 8 substituted for that word "damage," "injury," and a number of courts have held that the injury occurs at the moment of release. This would mean, under the revisions provided for under S. 8, that if a release of hazardous substance occurred before 1980, there could no longer be a natural resource damage case about that, even though there are damages being incurred now, and the public was suffering as a result of that release back before 1980. We don't believe that that is appropriate and we ask that the committee return to the original language of the statute.

Senator CHAFEE. All right, thank you very much. I would commend the non-use values to our members here, to read that portion over, and I am sorry to cut you off a little bit.

We're going to have a few questions before the witching hour comes.

Governor Nelson, what do you say about what Ms. Subra had to say? I thought that she had some pretty good points.

Governor NELSON. Well, I wouldn't discount her points, but I would say that—

Senator CHAFEE. I mean, what do we do if a State won't step up to the mark?

Governor NELSON. First of all, if they're going to step up to the mark and have either a delegation or an authorization, they're going to have to have a plan that passes the test of competence and demonstrate their ability to perform to the EPA in order to get it. If they don't demonstrate it, then they don't get it. That's why we said that they shouldn't be on a site-by-site basis; it ought to be on their overall performance in dealing with the sites.

The second thing is that I don't think Federal legislation ought to solve every local problem that can be solved at the local level. If the State of Louisiana, in the minds of its people, is not doing

an adequate job in dealing with the non-Priority List sites, then that ought to be a determination made, if there is a majority of the people in Louisiana who feel that way, they can make their wishes known. That's what the elective process is about.

Senator MOYNIHAN. Governor, that's why we're having to stop at 4:30. Would you kind of avoid that subject?

[Laughter.]

Governor NELSON. I think I understand, Senator. Fewer elections create fewer problems.

Senator CHAFEE. All right.

Senator BAUCUS.

Ms. SUBRA. Could I respond to his concerns briefly?

Senator CHAFEE. Yes, but I've cut the leave time for everybody. Thirty seconds.

Ms. SUBRA. OK.

One of the things is the default provision in the mark bill, and it says that if you don't do an action from EPA on a State delegation, it is automatically delegated. So if EPA gets overburdened and States apply, whether or not they are adequate, whether they have the rules, whether they have the finances, under default they are going to get the program.

Senator CHAFEE. I see.

All right, Senator BAUCUS.

Senator BAUCUS. Thank you, Mr. Chairman.

Ms. Subra, your views on the remedy selection provisions in S. 8?

Ms. SUBRA. They don't go far enough.

Senator BAUCUS. Why?

Ms. SUBRA. They are not protective of human health and the environment. There is too much emphasis on the hot spots, too much on containment. You are leaving the waste there to future impact the citizens. In locations where we have tried containment, the containment has started to fail, especially in Louisiana where we get 60 inches of rainfall.

Senator BAUCUS. Would you agree that in the current law there is too much of a preference for treatment?

Ms. SUBRA. I think there may be too much preferential treatment at some locations, not all of them. But what we're doing is moving toward treating the part that exceeds the criteria, and not treating the other part. In fact, that's what we were doing at the one site, and in fact we found out that we were contaminating it more when we solidified with the Portland cement.

Senator BAUCUS. But you do say that the current provisions—in S. 8, anyway—are too lenient with respect to the treatment?

Ms. SUBRA. Yes.

Senator BAUCUS. Mr. Johnson, with respect to non-use values, there has been a lot of debate to what degree we should address natural resource damage claims; do we address inherent value, intrinsic value, etc.? Do you think we should?

Mr. JOHNSON. Yes, I believe that we should.

Senator BAUCUS. Why?

Mr. JOHNSON. There are several reasons for that. Natural resources have values much beyond their value as simply being used for certain things, and there are numerous natural resources that have no use value whatsoever. The piping plover and endangered

species—they have no real uses, but we as a society spend a considerable amount of money to protect those species from harm because we value them, because they just are.

If we are to eliminate non-use values from the calculus of determining when to restore natural resources, when to seek damages, when to replace them of that, we will be ignoring all of those values and we will be ignoring those resources.

Senator BAUCUS. OK. I appreciate that. I see my yellow light is about to turn red.

Governor, I understand that the Governors also support including recovery of resources at intrinsic value.

Governor NELSON. That's correct. I should say that our goal would be toward restoration, but we do support that.

Senator BAUCUS. OK.

Mr. Chairman, I might say that there is some suggestion that the western position is in favor of dramatically limiting natural resource damages. I would like to include in the record a letter from the western Attorneys General who say expressly, "We write to express our continuing concern about the potential impact of S. 8's natural resource damage positions, especially on western States." I would like that included in the record, please.

Senator CHAFEE. Senator Smith.

Senator SMITH. Thank you, Mr. Chairman.

I just want to say, in the very brief period of time that we have, to thank you, Governor Nelson and Mayor Perron, especially for coming today and your cooperation on behalf of your respective organizations for the input that you have provided us over the months—years, I guess—as we have tried to put this legislation together. You've been very helpful.

I would just say in response to what the Governor said in response to his questions, and what Ms. Subra said, we make four very clear points in the legislation regarding the State role. In order for the State to receive this, it has to have adequate legal authority, financial and personnel resources; the State cleanup program must be protective of human health and the environment; and the State has procedures to ensure public notice and, as appropriate, an opportunity for comment on remedial action plans. And the State must agree to exercise its enforcement authority to require that persons that are potentially liable should, wherever practical, pay for the response action.

So it's not a case where a State would have this dumped on it without the resources. So if there is a State, as was indicated by you, Governor, that is not capable, then they're not going to get the program. So I think it's important to clarify that, because that's been misrepresented.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you.

Senator MOYNIHAN.

Senator MOYNIHAN. I believe Mr. Sessions is next.

Senator CHAFEE. All right, Senator Sessions.

Senator SESSIONS. Well, I won't take but a minute. Maybe I'll just—

Senator CHAFEE. You can take 2 minutes, and Senator Moynihan is going to have his time, and even if we all go to jail, we're going to get the time that we need.

[Laughter.]

Senator SESSIONS. OK. Senator Moynihan can talk to the Democratic leader, maybe, about that.

Let me say this. I will just ask briefly—you have the Mayors represented, and the Governors, and the Attorneys General. Is it the consensus of you three governmental officials that the Superfund bill as now written is in severe need of reform? Do you all agree to that?

Governor NELSON. Yes.

Mayor PERRON. Yes.

Senator SESSIONS. Do you think there is any minority opinion about that among your associations, or is that pretty universal among your membership?

Mayor PERRON. Bipartisanly.

Governor NELSON. A bipartisan decision that needs to be reformed.

Mr. JOHNSON. I think the Attorneys General's position is that the present statute needs to be sharpened and streamlined, but its basic, fundamental principles need to be preserved.

Senator SESSIONS. Governor, you are talking about a Federal release from liability. What you are saying is that once a site has been completed, that land or property can be almost valueless unless someone will certify that they are not going to be subject to additional liability claims?

Governor NELSON. That's exactly right, Senator. I think the State can be in a position to bring about a change for the use of the land and get a restoration of the land for an appropriate use, but if there is a question about second-guessing and/or continuing Federal liability, it's going to be very difficult to do some of these projects that I think you could do otherwise.

Senator SESSIONS. Could be available for industrial development, but could not be done because of that?

Governor NELSON. That's right.

Senator SESSIONS. Well, I think that's all.

Senator Moynihan, I'll defer to you, or to you, Mr. Chairman. I yield my time, what little I have left.

Senator CHAFEE. Senator Moynihan.

Senator MOYNIHAN. Yes, sir. I would simply want to thank the witnesses, especially Governor Nelson and Mayor Perron.

I think there is a problem you were speaking of, Mr. Johnson; if you served a long time on this committee, you would become aware of it.

In 1978, sir, it was discovered that the General Electric Company had dumped a very large amount of PCBs into the Hudson River at Fort Edward—the Last of the Mohicans, Fort Edward. This committee enacted legislation which appropriated money, \$20 million, to clean up those PCBs. And, sir, they are still there. Twenty years have gone by, and your department has done nothing; the Department of Environmental Conservation—I'm sorry, the Department of Environmental Conversation—

[Laughter.]

Senator MOYNIHAN [continuing]. Has done nothing. And yet it doesn't seem to trouble people. You around, putting into place extraordinary proposals. I have a friend in Columbia County who happened to have a lake that was a millpond at one point; he wanted to restore the lake, and the department said, "Well, you could do it for about a million and a half dollars."

This litigation pattern has become entropic and it defeats its purposes. Would you go back and ask the Attorney General whatever happened to that money that this committee provided to get rid of those PCBs?

Mr. JOHNSON. I would be happy to go back.

Just for clarification, I am with the Attorney General's Office. The Department of Environmental Conservation is a separate State agency.

Senator MOYNIHAN. We have more than a few State agencies, I assure you. We invented them.

[Laughter.]

Mr. JOHNSON. I can tell you that the Department of Environmental Conservation and the New York State Attorney General's Office have, in the past 5 years, issued a number of violations to the General Electric Company with respect to the discharge and the failure to clean up aspects of PCB contamination. As a result of those actions, GE has spent in excess of \$50 million in the last several years to address that contamination.

Senator MOYNIHAN. As a result of those actions, GE is leaving New York State. I'm quite serious. From the beginning of the Love Canal to the PCB leaks, there is a lot of entropy in this system.

Mr. Chairman, we congratulate you on your statute.

Ms. Subra, I thank you, too.

Senator CHAFEE. Does anybody have a question for these fine witnesses who have come so far?

[No response.]

Senator CHAFEE. Well, we want to thank all of you very much for coming. I know that each of you came a long distance and—

Senator BAUCUS. Mr. Chairman, if I might—I'm sorry to interrupt you.

Senator CHAFEE [continuing]. We have your testimony, and it was very constructive and helpful. We are going to go ahead as Senator Smith has suggested. We will be meeting with Administrator Browner as soon as reasonably possible, Senator Baucus, Senator Lautenberg, and myself. Your testimony has been very constructive.

Senator MOYNIHAN. Can we submit questions?

Senator CHAFEE. Certainly, you can. Well, why don't you ask it now?

Senator MOYNIHAN. No, sir, they are questions that I think the Governor would like to have some time for.

Senator CHAFEE. All right.

[The questions and the answers thereto follow:]

OFFICE OF THE ATTORNEY GENERAL,
New York, NY, September 9, 1997.

Hon. JOHN H. CHAFEE,
Chairman, Committee on Environment and Public Works,
U.S. Senate Washington, DC.

re: Committee Hearing of September 4, 1997.

DEAR CHAIRMAN CHAFEE: At the September 4, 1997, hearing on your revised version of S. 8, Senator Moynihan asked me the fate of \$20,000,000 that had been appropriated for the use of the New York State Department of Environmental Conservation ("NYSDEC") for a Hudson River demonstration project addressing PCB contamination. I request that this letter responding to that question be included in the hearing record.

In Public Law 96-483, §10 (October 21, 1980), Congress provided that up to \$20,000,000 may be obligated by the United States Environmental Protection Agency ("EPA") Administrator for a Hudson River PCB Reclamation Demonstration Project. The funds would be available to the extent that, as determined by the EPA Administrator, there were not other funds available from "a comprehensive hazardous substance response and clean up fund." Federal Water Pollution Control Act, §116(b), 42 U.S.C. §1266.

In early 1981, EPA granted New York \$1.72 million of the Section 116 funds to begin preparation of the project. By October 1982, NYSDEC had completed and EPA had reviewed the necessary scientific studies and environmental reviews to select a location known as Site 10 in Washington County, NY, as the site for an encapsulation facility, a secure landfill, to hold sediments to be dredged from the Hudson River. However, on December 30, 1982, former EPA Administrator Ann Gorsuch issued a decision denying release of the remaining Section 116 funds on the ground that Superfund monies were available.

The State of New York, together with a number of environmental organizations and others, filed suit against EPA in 1983 regarding Administrator Gorsuch's determination. In May 1984, after a decision by then EPA Administrator William Ruckelshaus to reconsider the availability of Section 116 funds, the lawsuit was settled. EPA agreed to grant New York the remainder of the Section 116 funds, approximately \$18.2 million, provided that additional scientific work was performed and that New York identify an appropriate encapsulation site for the dredged sediments and obtain the necessary permits to allow use of the site by 1988.

However, local opposition to the use of Site 10 resulted in a decision in March 1985 by the New York Court of Appeals invalidating the site's selection on the ground that the State did not have the authority to overrule local zoning provisions that would prohibit such facilities. *Washington County CEASE, Inc. v. Persico*, 64 N.Y.2d 923 (1985). NYSDEC resumed efforts to identify an appropriate disposal site for the dredged materials that met legal requirements, but was unable to do so before the expiration in 1989 of the funding authority. Consequently, the remainder of the Section 116 funds was utilized for publicly-owned treatment plant construction as permitted by the statute. That same year, EPA began its Superfund reassessment remedial investigation and feasibility study of the Hudson River to determine whether additional remedial measures should be taken to address the continuing PCB contamination of the river. EPA is scheduled to reach a decision by December 1999.

While measures have been taken to reduce the flow of PCBs to the Hudson River, the river remains contaminated by large quantities of contaminated sediments that have affected river biota and its uses, both ecological and human, and have reduced the value of this natural resource. The changes proposed to CERCLA's natural resource damage provisions in S. 8 would radically alter the State's ability to insure restoration of the river and its environs. We urge that substantial modifications be made to S. 8 to preserve a central principle of Superfund for our children: making the public whole when chemical contamination degrades our resources.

In closing, I again thank you and the committee for the opportunity to testify.

Yours truly,

GORDON J. JOHNSON,
Deputy Bureau Chief.

Senator CHAFEE. We also have the testimony that has been submitted by the other witnesses, which we will review if we don't get a chance to get back to those witnesses.

Senator CHAFEE. Senator Baucus.

Senator BAUCUS. Mr. Chairman, I want to compliment you for the way you have conducted this hearing, and also compliment very much the witnesses, who I think have given very good testimony. It will help us in the deliberation and help us to follow up on your suggestion as well, which originally came from Senator Smith, that we get back on track, sit down and work this out so that we come up with a resolution.

Senator CHAFEE. Thank you.

Thank you all again.

[Whereupon, at 4:35 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF CAROL M. BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good afternoon, Mr. Chairman, and members of the committee. I am pleased to have this opportunity to appear before you to discuss the Superfund program and the progress of legislative reform of Superfund in the 105th Congress.

With all the attention on how to fix Superfund, it is easy to forget what Superfund is all about. Superfund is an important, and above all, a necessary program, dedicated to cleaning up our nation's hazardous waste sites. EPA has worked closely with the Agency for Toxic Substances and Disease Registry (ATSDR) in evaluating the impacts of these sites on public health. Superfund site impacts are real. ATSDR studies show a variety of health effects that are associated with some Superfund sites, including birth defects, cardiac disorders, changes in pulmonary function, impacts on the immune system (the body's natural defense system from disease and sickness), infertility, and increases in chronic lymphocytic leukemia. EPA also works with other Federal agencies to assess the impacts of hazardous material releases on natural resources and the environment. Together, the efforts of these agencies, working with EPA, provide the basis for targeting cleanups to protect public health and the environment, and show the need for Superfund.

The Clinton Administration remains committed to responsible, Superfund legislative reform. Earlier this year, in March, I gave you my commitment to participate in a bipartisan process to build consensus on Superfund legislation. While original expectations for consensus reform were high, I am disappointed that our shared goal of enacting responsible Superfund reform legislation this year may not be realized. I am afraid that the markup of the chairman's mark of S.8 scheduled for next week will not produce a bill that enjoys the support of the Administration, Senate Democrats, or a broad range of Superfund stakeholders. Without this consensus, a Superfund bill cannot become law.

In order to enact such a consensus bill, we must reflect the current, fundamentally different Superfund program. In March, I stressed the need to evaluate statutory reform from the perspective of the Superfund program of today, not on the basis of out of date problems now resolved. As implementation of the Administrative Reforms progresses, we continue to appreciate the advantageous flexibility this administrative approach affords us to make adjustments as experience is gained, and juggle our workload. A good example is the Remedy Update Administrative Reform, which focuses on adjusting remedies to changing science and technology. Because of administrative flexibility, in our implementation of this reform we have seized opportunities to make other remedy improvements, and have been able to pace our updates, so as not to slow down overall cleanup progress.

Building on the progress of the Administrative Reforms, on May 7, 1997, the Clinton Administration provided you with its Superfund Legislative Reform Principles. These Principles reflect the Administration's vision for the future of Superfund—a future that builds upon our progress over the past 4 years. In that time, we have worked to make Superfund a fundamentally different program, and these Principles reflect this change. The current Superfund program is faster, fairer and more efficient in protecting the nearly 70 million Americans, including 10 million children, who live within four miles of a toxic waste site. These Principles were shared so that you and the many stakeholders affected by these cleanups can understand our vision for the future and for the legislative reforms that will help shape that future.

The Administration's goals for Superfund reauthorization continue to be to: protect human health and the environment; maximize participation by responsible parties in the performance of cleanups; ensure effective State, Tribal and community involvement in decisionmaking; and promote economic redevelopment or other beneficial reuse of sites. The Administration further believes that all of these goals should be undertaken in a manner that: increases the pace of cleanups; improves program efficiency and decreases litigation and transaction costs; and does not disrupt or delay ongoing progress.

I am encouraged to see some changes to S.8 have been negotiated since I last testified. Unfortunately, the majority of the bill's provisions do not reflect the current state of the program and the Administration's Principles, and are still troubling. The Administration began this process ready to work with you to craft Superfund reform legislation that could attract broad consensus support. We continue to support a consensus based legislative process, and if such a process can be reinstated, we believe we can craft a proposal that meets our goals and delivers on our commitment to achieve Superfund reform in the 105th Congress.

My purpose today is threefold: (1) to update you on the continued accomplishments EPA has achieved over the past few years, not only maintaining, but accelerating the pace of cleanup through three rounds of Administrative Reforms; (2) to discuss the Administration's Superfund Legislative Reform Principles, which are based on the current accomplishments of the Superfund program; and (3) to discuss our concerns with the chairman's mark of S.8, which continues to fail to meet our Administration's Principles for responsible legislative reform.

Finally, the Administration remains concerned over the expiration of the authority to replenish the Superfund Trust Fund. It has been 2 years since the tax expired, leaving industry with a windfall while the Trust Fund diminishes. The Congressional Budget Office has projected that the Trust Fund will, at the end of the next fiscal year, have less remaining than will be needed to keep the program operating, to keep site cleanups underway, in the following fiscal year.

In addition to the expiration of the tax, we are disappointed with the recent denial of the President's request for additional appropriated funds to address the backlog of Superfund sites that are currently awaiting cleanup. Without the availability of these additional funds, many communities will simply have to wait for cleanups in their neighborhoods, even though the studies are done, and the only thing preventing us from starting cleanup is a lack of funds.

A FUNDAMENTALLY BETTER SUPERFUND PROGRAM

Before discussing Superfund legislation, I'd like to provide an update to my testimony given in March on the current status of the Superfund program. To reiterate, proof of a faster, fairer, more efficient Superfund program can be found in several simple indicators. We have completed cleanup at 447 sites on the National Priorities List, and 500 more are in construction. We have reduced by more than a year the average duration of the long-term cleanup process, with much faster cleanups at sites using presumptive remedies. The President's budget request for Fiscal Year 1998 would have allowed us to double our cleanup goals over the next few years and have 900 sites completed by the end of the year 2000. Our most recent analysis make us optimistic that we can continue to accelerate the pace of cleanups and achieve our goal of a 20 percent reduction, or 2 years, in the total cleanup process time. Additionally, responsible parties are performing or funding approximately 70 percent of Superfund long-term cleanups, saving taxpayers more than \$12 billion.

Meanwhile, EPA has succeeded in removing over 14,000 small contributors from the liability system, 66 percent of these in the last 4 years. We offered orphan share compensation of over \$57 million last year to responsible parties willing to negotiate long-term cleanup settlements, and continued the process this year at every eligible site. Finally, costs of cleanups are decreasing because of a number of factors, including: the use of reasonably anticipated future land use determinations, which allow cleanups to be tailored to specific sites; the use of a phased approach to defining objectives and methods for groundwater cleanups; and EPA's 15-plus years of implementing the program providing greater efficiencies and lower costs when selecting cleanup options.

Through the commitment of EPA, State, and Tribal site managers, and other Federal agencies, EPA has achieved real results protecting public health and the environment while experimenting with and instituting changes to our cleanup process through its Administrative Reforms. EPA is committed to further administrative and regulatory improvements in the Superfund program in the years ahead. Our objectives for administrative reform have been to:

- Protect public health and the environment over the long-term, while lowering the cost of cleanups
- Increase the pace of cleanups
- Preserve the principle that parties responsible for contamination should be responsible for cleaning it up, while promoting fairness in the liability scheme, and reducing transaction costs and litigation
- Involve local communities, States, and Tribes in decisionmaking
- Promote economic redevelopment at Superfund sites

The success of the Administrative reforms has been demonstrable. In a December 1996 report, the Superfund Settlements Project (SSP), a private organization comprised of industry representatives, acknowledged EPA's "substantial" track record "since EPA began implementing the October 2, 1995 administrative reforms . . . especially in light of the severe obstacles that EPA encountered during fiscal year 1996 as it began implementation of these reforms."

Since the March hearing, the Administrative Reforms have continued to be evaluated by parties outside the Agency, such as the Chemical Manufacturer's Association (CMA) and the United States General Accounting Office (GAO). In their April 1997 report, CMA, a non-profit trade association whose member companies account for more than 90 percent of the productive capacity for basic industrial chemicals in the United States, stated that "at sites where the reforms have been fully applied so far, EPA's reforms have produced benefits that otherwise would not have occurred."

GAO, the investigative arm of Congress charged with examining all matters related to the receipt and disbursement of public funds, found that "while EPA has not evaluated the overall effects of the reforms, the Agency has reported quantifiable accomplishments resulting from the implementation of 6 of the 45 reforms." The GAO report, however, did not attempt to measure the innumerable unquantifiable benefits of the Administrative Reforms, such as the experience and knowledge gained from pilot projects, or even the lawsuits not filed as a result of liability reforms for small parties.

For a detailed discussion of the Administrative Reforms, please refer to my testimony before this committee in March. Before discussing the Administration's Legislative Reform Principles, however, I'd like to provide you with an update on some of the many successes we have achieved since my last appearance before this body.

Providing Protective Cleanups at Lower Costs

EPA is continuing a number of administrative reforms which promote cleanups that are technologically and scientifically sound, cost-effective and appropriately consistent nationally. These reforms will lower cleanup costs, while assuring long-term protection of human health and the environment.

EPA's National Remedy Review Board is continuing its targeted review of complex and high-cost cleanup plans, prior to final remedy selection without delaying the overall pace of cleanup. Since the Board's inception in October 1995, it has reviewed 19 cleanup decisions at 18 sites, resulting in estimated cost savings of approximately \$23-\$38 million. In addition, EPA has achieved great success in updating cleanup decisions made in the early years of the Superfund program. After 2 years of implementation, more than \$500 million in future cost reductions are predicted as a result of the Agency's review and update of remedies at more than 90 sites. It is important to stress, however, that these future cost reductions can be achieved while still preserving appropriate levels of protection, and the current pace of the program.

Increasing the Pace of Cleanups

The completion of 447 Superfund toxic waste site cleanups (as of August 29, 1997) is a significant measure of the improved pace of cleanups. Currently, over 85 percent of the sites on the National Priorities List (almost 1,200 of 1,347) are either undergoing cleanup construction (remedial or removal), or have been completed. EPA is continuing the use of its Superfund Accelerated Cleanup Model (SACM) to spark early cleanup action, and standardized or "presumptive" remedies, as well as other reforms, to maintain and increase this pace.

Promoting Fairness in Enforcement

EPA's "Enforcement First" strategy has resulted in responsible parties performing or pay for approximately 75 percent of long-term cleanups, thereby conserving the Superfund trust fund for sites for which there are no viable or liable responsible parties. Through Administrative Reforms, EPA has addressed the concerns of stakeholders regarding the fairness of the liability system. EPA has continued implementation of its 1996 "orphan share compensation" policy, under which EPA offers to "forgive" a portion of its past costs and projected future oversight costs during every

settlement negotiation for long-term cleanup or non-time critical removal, to cover some or all of the orphan share at the site. The orphan share policy has encouraged settlement, rather than litigation, and enhances the fairness and equity of settlements. Last year, the Agency offered over \$57 million in orphan share compensation to potential settling parties across the United States, and continued that practice this year at every eligible negotiation.

In addition, EPA continues to use its settlement authority to remove small volume waste contributors from the liability system, responding to the burden third-party litigation can place on parties that made a very limited contribution to the pollution at a site. To date, the Federal Government has completed settlements with over 14,000 small volume contributors at hundreds of Superfund sites, protecting these parties from expensive private contribution suits. In addition, EPA continues to step in to prevent the big polluters from dragging untold numbers of the smallest “*de micromis*” contributors of waste into contribution litigation by publicly offering to any such party \$0 (i.e., no-cost) settlements that would prevent lawsuits by other PRPs. The real success of this approach is to be measured by the untold number of potential lawsuits that we have discouraged.

Finally, EPA is continuing the successful use of site-specific special accounts to direct settlement funds toward cleanups (over \$220 million in principal, and \$35 million interest generated from more than 70 accounts), and is continuing implementation of its many pilot projects, such as the allocation pilot project, as well as other reforms to the liability system.

Involving Communities and States in Decision Making

The Agency supports the principle that communities must be offered opportunities for involvement in the cleanup process as early as possible and continue to be involved to the time the site is cleaned up. Our “consensus-based” approach to the remedy selection process continues to empower local citizens and other stakeholders to be involved in the remedy selection process that ultimately results in EPA choosing common sense remedies that meet statutory and regulatory requirements. In addition, our Regional Ombudsmen continue to serve as a direct point of contact for stakeholders to address their concerns at Superfund sites, and our electronic lines of communication and our Internet pages continue to provide information to our varied stakeholders on issues related to both cleanup and enforcement.

Additionally, EPA continues to acknowledge the successes that States are achieving conducting thousands of hazardous waste site cleanups under State and Federal Superfund programs. Most of these sites are short-term, relatively inexpensive actions that address immediate hazards, and a growing number are conducted pursuant to State voluntary cleanup programs, as discussed below. EPA is continuing to increase the number of sites where States and Tribes are taking a lead role in assessment and cleanup using the appropriate mechanisms under the current law. Agreements such as those with the State of Minnesota and the State of Washington are excellent examples of these efforts, which build upon a foundation of demonstrated State readiness, and provide clear State decisionmaking authority with support from, but minimal overlap with EPA.

States are developing voluntary cleanup programs to speed up the cleanup non-NPL sites, which, generally speaking, pose a lower risk than those sites listed the NPL. These voluntary cleanup programs pose an alternative to the conventions CERCLA or State Superfund-like enforcement approach to cleaning up contaminate sites. Through State voluntary cleanup programs, site owners and developers identify and cleanup sites by using less extensive administrative procedures. The site owners and developers may then obtain some relief from future State liability for past contamination. This approach encourages cleanup of sites, such as Brownfields, that might otherwise not be cleaned up because of limited Federal and State resources.

In addition, financial and real estate sectors are sometimes reluctant to support the redevelopment of brownfields and lower risk sites because they are concerned about potential Superfund liability. Some developers have also expressed concern the uncertainty arising from potentially overlapping Federal/State cleanup authority can become a disincentive to clean up and redevelopment of these sites. EPA is addressing this concern by clarifying EPA and State roles and responsibilities, which helps reduce such uncertainty and promotes the cleanup and redevelopment of lower risk sites, such as Brownfields.

To encourage partnerships with States and Tribes, EPA recently announced issuance of draft guidance that promotes State voluntary cleanup programs, and encourages States to create such programs. The draft guidance sets out baseline criteria that EPA will use to evaluate State voluntary cleanup programs. This evaluation will be part of the negotiation of a Memorandum of Agreement (MOA), or planning

document providing roles and responsibilities between EPA and the State the clean-up of lower risk sites. For those sites included within the scope of the MOA, EPA will not exercise cost recovery authority and does not generally anticipate taking CERCLA removal or remedial actions at sites except under limited circumstances.

In addition, this draft guidance includes a draft site designation or screening process and proposes that this new process be used in conjunction with the guidance to designate sites as either Tier II (lower risk sites that are eligible for inclusion with the scope of an MOA concerning a State voluntary cleanup program) or Tier I (high risk sites of the type that historically have been listed on the National Priorities List Tier I sites are not eligible for inclusion within the scope of an MOA concerning a State voluntary cleanup program). The Agency believes this is a unique and valuable feature of the guidance because it will enable developers and other parties to use the process outlined to make Tier I and Tier II designations. Understanding the potential for Superfund involvement enables stakeholders to make more informed property cleanup, transfer and redevelopment decisions.

The guidance has been published in the Federal Register for review and comment. In conjunction with the Brownfields Initiative, EPA also authorized financial assistance to such voluntary cleanup programs. EPA is providing \$10 million, earmarked in fiscal year 1997 appropriations, to encourage the development or enhancement of State programs that encourage private parties to voluntarily undertake early protective cleanups of less seriously contaminated sites, thus accelerating their cleanup and their redevelopment.

Promoting Economic Redevelopment

EPA is continuing to promote redevelopment of abandoned and contaminated properties across the country that were once used for industrial and commercial purposes ("brownfields"). Brownfields sites exist in this country, affecting virtually every community in the Nation. The Administration believes strongly that environmental protection, public health, and economic progress are inextricably linked. Rather than separate the challenges facing these communities, our brownfields initiative seeks to bring all parties to the table—and to provide a framework for them to seek common ground on the whole range of challenges: environmental, economic, legal and financial. The EPA brownfields pilot grants are forming the basis for new and more effective partnerships. In many cases, city government environmental specialists are sitting down together with the city's economic development experts for the first time. Others are joining in—businesses, local residents, community activists.

EPA's efforts have been accomplished through the Brownfields Action Agenda—an outline of specific actions the Agency is conducting. The initial Brownfields Action Agenda outlined four key areas of action for returning brownfields to productive reuse: (1) awarding Brownfields Assessment Demonstration Pilots; (2) building partnerships to all Brownfields stakeholders; (3) clarifying liability and cleanup issues; and (4) fostering local workforce development and job training initiatives. A new Action Agenda for fiscal years 1997 and 1998 is designed to further identify, strengthen, and improve the commitments EPA and its colleagues can make to brownfields.

The Brownfields Assessment Pilots form a major component of the Brownfields Action Agenda. EPA has committed to fund 115 assessment pilots to date at up to \$200,000 each. We are also preparing to award a second stage of brownfields pilots this year: The Brownfields Revolving Loan Fund (BRLF) Pilots are designed to enable eligible States, cities, towns and counties, Territories, and Indian Tribes to capitalize revolving loan funds to safely cleanup and sustainably reuse brownfields. EPA's goal is to select BRLF pilots that will serve as models for other communities across the Nation. In the 1997 fiscal year, EPA's budget for brownfields includes \$10 million to capitalize BRLFs. Only entities that have been awarded National or Regional Brownfields Assessment Demonstration Pilots by September 30, 1995, will be eligible to apply to EPA's BRLF pilot program. Therefore, up to 29 BRLF pilots may be awarded in fiscal year 1997. Fiscal year 1997 BRLF pilots will be funded at up to \$350,000. The BRLF will be awarded through an evaluation process. Eligible entities will be required to demonstrate evidence of a need for cleanup funds, ability to manage a revolving loan fund, ability to ensure adequate cleanups, and a commitment to creative leveraging of EPA funds with public-private partnerships and matching funds/in-kind services.

Another facet of the Brownfields initiative is also scheduled for implementation this year. The Brownfields Showcase Communities project is an attempt to focus Federal Government attention on selected communities across the United States. Those communities selected through an application process will receive special technical, financial and targeted Federal assistance to address issues of contaminated urban and rural properties.

EPA and 15 other Federal agencies are sponsoring the Brownfields Showcase Communities project. Through a multi-agency panel, applications will be reviewed and 10 Showcase Communities will be selected in 1997. These communities will be models for Federal coordination and cooperation.

Finally, our recent work-together to enact the Brownfields Tax Incentive fully demonstrates our shared commitment to responsible legislation on these issues. This is a 3-year tax incentive plan that will reduce the cost of cleaning up thousands of contaminated, abandoned sites in economically distressed areas. It is anticipated that this \$1.5 billion tax incentive will leverage more than \$6 billion in private funded cleanups at an estimated 14,000 brownfields.

SUPERFUND LEGISLATIVE REFORM PRINCIPLES

The Agency continues to implement the improvements to Superfund that have been made through Administrative Reforms. Throughout the course of the reauthorization process, we have heard stakeholders express their concerns and have taken the opportunity to address those concerns. We recognize, however, that there are areas of the law that could benefit from legislative provisions. Therefore, the Administration based its goals for Superfund legislative reform on the status of the current, reformed program.

Legislative reform must build upon the successes of the current Superfund program and the lessons learned through three rounds of Administrative Reform. We believe legislative reform must be targeted to address critical issues in need of a legislative solution. Our goals for legislative reform continue to be to: protect human health and the environment; maximize participation by responsible parties in the performance of cleanups; ensure effective State, Tribal and community involvement in decisionmaking; and promote economic redevelopment or other beneficial reuse of sites, all in a manner that increases the pace of cleanups, improves program efficiency and decreases litigation and transaction costs, and which does not disrupt or delay ongoing progress.

Protection of Human Health, Welfare and the Environment

Any legislative changes addressing cleanup decisions must, as a baseline, continue to ensure that cleanups are protective of human health and the environment over the long term. Cleanups should also be cost-effective, and foster productive reuse of contaminated property, and restore groundwater to beneficial uses, wherever practicable.

In order to facilitate these goals, the Administration supports treatment for those wastes that are highly toxic or highly mobile, in light of the continuing challenges in ensuring the long-term reliability of engineering and institutional controls, as well as the limitations that containment and institutional controls place on productive reuse or redevelopment of property. The Administration supports modifying the current mandate for permanence to emphasize long-term protection and reliability.

The Agency continues to believe that treatment of highly toxic or highly mobile waste offers advantages over containment or other measures. As a result, we are currently striving to implement these goals today, using treatment where necessary, at such sites as the Bayou Bonfouca Site in Louisiana. At this site, EPA determined that incineration was necessary to treat creosote waste, including Benzo(a)pyrene, that had leaked into a bayou. The creosote mixture was so potent, that divers received second degree chemical burns from contact with the contaminated sediments. The contamination appeared to have killed all life in the bayou. Treatment was necessary at this site to permanently eliminate the threat from these materials.

Additionally, legislation should not alter our goal of restoring groundwater to beneficial uses, wherever practicable. Over half of this nation's population relies on groundwater at its source of drinking water. Superfund has raised consciousness about the need to prevent contamination of this resource by demonstrating the consequences—financial, technological, and practical—of contamination that threatens real people now and future generations. As a result, we believe that Maximum Contaminant Levels under the Safe Drinking Water Act or more stringent applicable State standards should be established as the cleanup standards for groundwater whose beneficial use is, or is anticipated, to be a drinking water source, unless technically impracticable.

Under the current program, EPA is using "smart" groundwater remediation to provide appropriate levels of protection at lower cost. In the early days of the program, we relied solely on extraction and treatment of groundwater to achieve cleanup objectives. In 1995, 60 percent of our groundwater cleanup decisions reflect extraction and treatment being used in conjunction with other techniques, such as bioremediation, underground treatment walls, or monitored natural attenuation, which is often used to reduce low levels of contaminants. In 1995, about 25 percent of

Superfund groundwater remedies included monitored natural attenuation of contamination. It is worth noting that our success in developing groundwater cleanup policy is consistent and concurrent with ongoing developments in science and technology and it uses the flexibility afforded under current law. This flexibility conserves resources and should be retained in any future legislation.

Another important principle supported by the Administration requires the continued consideration of reasonably anticipated future land uses, based on consultation with the affected community, site owners, and others, in the process of selecting cleanup options. By involving the community in this manner, we can structure cleanups that not only protect human health and the environment, but also meet the needs of the local community.

Additionally, the Administration believes that cleanups should comply with the applicable substantive requirements of other Federal environmental laws and State environmental or facility siting laws applicable to clean up activities. It is important to continue to protect these strong State and Federal interests, especially where these requirements directly relate to the cleanup activities being considered. However, the Administration does support some flexibility regarding requirements that have been traditionally referred to as "relevant and appropriate." As a result, the Administration supports removing the statutory requirement to comply with these requirements.

Finally, there are many components of Superfund cleanup provisions proposed by various parties that the Administration would strongly oppose. Chiefly among them are provisions that would mandate reopening of cleanup decisions; provisions that would fail to discourage contamination of currently uncontaminated land, groundwater, or natural resources; provisions which would require prescriptive cost or risk assessment requirements; and most importantly, provisions which would delay cleanups or result in cleanups that are inadequately protective of human health, welfare, and environmental and natural resources.

Fairness and Reduced Transaction Costs

In discussing any proposed legislative changes to the Superfund liability scheme, it is imperative to retain the fundamental principle that those responsible for the contamination must pay for the cleanup. This has been the cornerstone of our ability to obtain as many cleanups as we have, and has left the Superfund trust fund available for truly abandoned sites and public health and environmental emergencies.

Within this bedrock principle, however, the Administration supports clearly defined exemptions or limitations on liability which reflect EPA's experience with Administrative Reforms. As a result, the Administration would support liability reform for certain generators or transporters of municipal solid waste, and for parties who sent less than 110 gallons or 200 pounds of hazardous waste. The government does not currently bring these parties into the system, but they have occasionally been pulled in by other parties, with expensive and unfortunate results.

EPA has continued its Administrative Reform policy of offering compensation for the "orphan share" (the contribution for responsibility attributable to insolvent and defunct parties) during every negotiation for long term cleanup and non-time-critical removal. The work we have done with orphan share compensation has significantly enhanced the fairness of the Superfund program. Although EPA does not need statutory authority to offer orphan share compensation, EPA supports legislation creating a separate mandatory spending account for orphan share, consistent with the President's Fiscal Year 1998 budget request, so that funds for orphan share do not compete with cleanup dollars or reduce the funding available for response actions.

One of the major benefits of our Administrative Reforms was the ability to experiment administratively with provisions of proposed Superfund laws through "pilots." Specifically, the consensus bill in the 103d Congress provided for an allocation process used to assess liability and distribute orphan share funding. While the Administration originally supported these provisions, and continues to support a process to help resolve issues related to settling liability, EPA's experience with several allocation pilot projects has informed our position and demonstrated some of the serious drawbacks with a rigid and prescriptive process. As a result, the Administration currently supports the use of a flexible, non-prescriptive process that makes effective use of available orphan share funding to reduce transaction costs by promoting settlements and encouraging allocation of costs among settling parties.

We also support statutorily addressing the liability of generators and transporters of municipal solid waste. EPA and the Justice Department recently issued a new municipal liability policy. Preliminary comments are extremely favorable toward the policy, which provides the opportunity for expedited final settlements for municipal owners, and generators and transporters of municipal solid waste. The Administra-

tion would support statutory changes which are consistent with this new policy. In addition, we believe that we should address the issue of bona fide prospective purchasers in our efforts to make sure that we can cleanup and reuse brownfield properties.

Finally, I reiterate that any changes to the liability and enforcement provisions of Superfund must ensure that those who created the problems be held responsible for cleanup. Further, changes in the law must not compromise the availability of cleanup dollars or endanger the speed or thoroughness of site cleanups and our ability to accomplish the President's goal of completing 900 additional cleanups through the year 2000. Any exemptions or limitations on liability—or use of Trust Fund money—must be considered against the backdrop of these principles. Therefore, the Administration has consistently opposed, and continues to oppose site-based “carve outs” that relieve viable, responsible parties of their obligation to clean up sites.

Meaningful Community Involvement

Through years of implementation of the program, EPA has determined that early and meaningful community involvement can increase the overall pace of cleanups. Though enhanced community involvement may add steps in the early portions of the cleanup process, this investment generally accelerates later cleanup stages, as all parties are informed and have had time to work through their concerns. EPA has learned the hard way that a decision process that alienates the people our cleanups are supposed to protect results in constant revisiting of decisions, not quicker cleanups.

We have also learned that we need a variety of tools and resources, and the flexibility to tailor the application of those tools and resources, to meet the particular needs of citizens at different sites. No two sites or communities are exactly alike. In some communities, citizens are disinterested in some large-scale NPL cleanups, and in other communities, citizens are keenly interested at some smaller scale cleanups. As a result, the Administration supports continued efforts to enhance community involvement and development and provision of information to communities, including the opportunity for formally established community advisory groups at Superfund sites.

Consistent with our experience, we support making Technical Assistance Grants (TAGs) available to citizens at non-NPL sites, in addition to NPL sites. Additionally, the Administration would like to continue to ensure direct input from citizens into the development of assumptions regarding reasonably anticipated land uses upon which cleanups are based. While we support processes which build consensus within communities, the achievement of consensus should never be the price of admission into the decisionmaking process. We must always listen to the diversity of views among citizens affected by hazardous waste sites.

Given the importance of public health information, we also support the continued protection of the health of people in communities impacted by Superfund sites through efforts of public health assessments, health effects studies, and other public health activities prescribed by law. In addition, the Administration also supports ensuring that communities have access to information about releases of hazardous substances and other toxics.

Finally, the Administration is strongly opposed to any provisions in a new law that would impair meaningful community input and involvement, or would disrupt existing citizen advisory groups or use inappropriate, prescriptive membership requirements for such groups.

Enhanced State and Tribal Efforts

In addition to the many changes and accomplishments of the Superfund program over the last 4 years, the context in which the program exists is also dramatically different. We recognize and support the continued growth of the State and Tribal regulated and voluntary programs; they have greatly expanded the number of hazardous waste sites cleaned up to protect human health and the environment. We fully support better coordination between Federal agencies and the States and Tribes.

As a result, the Administration supports Superfund legislation that provides greater opportunities for States and Tribes to address a full range of hazardous waste sites for which they have the necessary response capacity. EPA will provide the financial and technical support needed to further improve existing programs. In order to do this, we support the use of flexible “partnership agreements” between EPA and States and Tribes, based upon demonstrated resources and capabilities, to enable all parties to work together to determine which sites should proceed under what authorities, and under whose lead, so that governmental resources are complementary, not duplicative.

Over the last 4 years, States, Tribes, and EPA have been implementing this process at many sites, and the results are encouraging. In general, States and Tribes have the primary role in the process of discovering new sites and making screening decisions about which sites warrant action. In comparison to just a few years ago, States now exert substantial control over not only which sites will be included on the National Priorities List, but also on the CERCLIS inventory. However, the more interesting story here is the tremendous variety of arrangements EPA and States and Tribes have worked out to address waste sites.

Because of the widely divergent status of Superfund programs at the State level, flexibility, as opposed to a "one-size-fits-all" approach, is crucial. We have seen the success of partnership agreements with such States as Minnesota and Washington, which have entered into Superfund program partnerships with EPA's Regional offices. As stated previously, these partnerships build upon a foundation of demonstrated State readiness, and provide clear State decisionmaking authority with, support, but minimal redundancy, from the Regions. Similar successes have been achieved in agreements with Federal Facilities, such as the agreement between EPA, the Department of Energy, and the State of Colorado at the Rocky Flats Superfund site.

When it comes to the role of States and Tribes, Superfund legislative reform must consider comprehensively the scope of the hazardous waste contamination problem. Federal, State and Tribal programs are trying to address across this country and how we are succeeding today in our efforts to organize our collective resources to achieve more protective cleanups. Within this context, we must recognize that the retention of strong cleanup standards, enforcement authorities, and sufficient resources at the Federal level provides States and Tribes with resources critical to the effectiveness of their own programs. It is particularly vital, for example, that the Federal emergency prevention, preparedness, and response capabilities, which are looked to as a model, and for support the world over, remain vital and effective.

Within the context of the flexible partnership, there are, however, several State-related concepts that the Administration strongly opposes, including: limitations on the Federal ability to provide response or to enforce a response; preemption of State and Tribal cleanup standards; State and Tribal waivers of Federal authority; a transfer of responsibilities to States or Tribes in a manner that would disrupt or delay cleanups or that would result in less protective cleanups; or default approvals of State or Tribal programs.

Finally, the Administration strongly opposes limitations on EPA's authority to list sites on the National Priorities List, including a cap on further listings on the NPL or premature or "default" deletion of sites from the NPL.

Economic Redevelopment

The Brownfields Economic Redevelopment Initiative has continued to achieve much success. The continuing value of the Brownfields Initiative is its evolution and promise for the future. To build upon these successful first steps and launch others we must not lose sight of our overall goal to revitalize communities. Future efforts under the Brownfields Economic Redevelopment Initiative must be viewed as an important component of any Superfund legislative reform strategy. With the breadth and variety of activities and stakeholders converging on the brownfields issue, we have tried to establish a framework that articulates a complete and comprehensive brownfields program. It is against this framework that we will measure proposals regarding the brownfields.

Brownfields legislative reforms should continue the progress made under EPA's administrative reforms and address the full range of Brownfield issues including: technical assistance funding for brownfields identification, assessment, and reuse planning; cooperative agreement funding to capitalize revolving loan funds for brownfields cleanup; support for State development of voluntary cleanup programs; liability protection for bona fide prospective purchasers and innocent landowners of contaminated property; support for mechanisms for partnering with Federal, State, local and tribal governments, and other non-governmental entities to address Brownfields; and support and long-term planning for fostering training and workforce development.

In summary, the above discussion represents the Administration's position regarding issues facing the current Superfund program. These Principles highlight some of the major elements we believe should be addressed in order to achieve consensus based, responsible Superfund legislative reform. Other issues addressed in the Administration's Legislative Reform Principles include Natural Resource Damages issues and Federal Facility Issues. I hope that we will once again work together toward crafting a Superfund bill that embraces these principles so that we

might give the American people a Superfund law that is fully protective and delivers on our commitment to achieve Superfund reform in the 105th Congress.

THE SUPERFUND CLEANUP ACCELERATION ACT OF 1997

The Administration has evaluated the chairman's mark of S.8, the Superfund Cleanup Acceleration Act of 1997, against the same criteria which have guided the Administration's Superfund Legislative Reform Principles.

I was pleased to see that since the early introduction of S.8, several changes have been made which fall within our Principles. However, the Clinton Administration strongly opposes the chairman's mark of S.8 in its current form. Given the short amount of time we have had to review the most recent draft, I have tried to identify the most important concerns below.

The Administration's most serious concerns are that: (1) the bill may fail to ensure long-term protection of human health and the environment; (2) it will slow down cleanups; (3) it lets polluters off the hook and shifts costs to taxpayers and consumers; and (4) it provides incomplete support for communities, States, and Tribes, and economic redevelopment. But perhaps more fundamentally, the chairman's mark of S.8 does not embody the Administration's Superfund Legislative Reform Principles, nor does it fully reflect the current status of the Superfund program.

Inadequate Protection

Remedies under the chairman's mark of S.8 would not assure protection of human health and the environment over the long term because highly toxic, highly mobile waste would probably not be treated, sources of groundwater contamination would not be required to be contained and reduced, and levels necessary for protection might be waived on the basis of cost.

No Effective Treatment to Ensure Long-Term Reliability

While the chairman's mark reflects bipartisan agreements with respect to a number of issues, and significant movement on others, the bill still lacks, what we believe to be, the provisions necessary to ensure that remedies will result in long-term protection of human health and the environment. While the chairman's mark contains a new preference for treatment, a substantial burden of proof must be met before the preference can even be applied: a site-specific analysis must demonstrate that the material (1) cannot be reliably contained, and (2) is highly toxic, and (3) is highly mobile, and (4) that there is a reasonable probability that actual exposure will occur. In addition, the bill exempts landfills and mining sites from the preference.

While bills in the 103d Congress contained similar provisions, they were exceptions to a requirement to treat hot spots. As reflected in the chairman's mark, treatment would probably never even be considered for many sites, that present a multitude of problems, some of which are amenable to treatment. Finally, the preference is neutralized by a conflicting provision, which states that institutional controls and engineering controls are to be considered on an equal basis to all other remedial actions, regardless of the hazard of the material in question.

As you know, the Administration's legislative reform principles support the idea of eliminating the mandate to utilize permanent solutions and treatment to the maximum extent practicable, in exchange for a new emphasis on long-term reliability, and retention of the preference for treatment of highly toxic or highly mobile waste. We believe such changes would eliminate the potential for "treatment for treatment's sake," but retain an appropriate presumption that materials posing the "principal threats" at sites due to the intrinsic hazards posed by their toxicity or mobility should be treated, unless impracticable.

Treatment of highly toxic or highly mobile wastes helps ensure that any materials managed onsite over the long-term would not pose a serious threat to human health and the environment. And obviously, the more contaminated material that remains onsite and the higher the potential risks it poses, the less likely productive reuse of that property, or significant portions of that property.

Groundwater Not Adequately Protected

The groundwater provisions of the chairman's mark reflects substantial movement from S.8 as proposed. I am pleased to see that restoration of contaminated groundwater to beneficial uses, unless technically impracticable, has been embraced, as called for by the Administration's principles. I am concerned, however, that two critical provisions necessary to ensure protection in the case where complete restoration is technically impracticable are notably missing—a requirement to contain and reduce sources of pollution that cannot be eliminated entirely and may continue to re-

lease pollutants to ground or surface water, and a requirement to contain the dissolved plume.

One issue on which there is a high degree of consensus is that restoration of an aquifer or part of an aquifer cannot occur unless new contamination is prevented from entering the groundwater. Given that a five-gallon bucket of the commonly used solvent trichloroethylene (TCE) can contaminate 800 million gallons of water at levels above drinking water standards, leading to enormous cleanup costs, it is imperative to control and minimize such sources. That is why the groundwater policies the Agency has issued under its Administrative Reform efforts have called for early control of both surface and subsurface sources as critical to successful groundwater remediation efforts. Surface sources include lagoons or landfills which may be leaching contaminants into groundwater. Effective control of such sources is one of the components critical to making monitored natural attenuation a viable cleanup option for some groundwaters.

Dense and light non-aqueous phase liquids (DNAPLs and LNAPLs) are good examples of subsurface sources which can pose a greater threat to groundwater over time because of the potential for the contaminants to migrate and accumulate in less accessible zones. The diverse panel of experts the National Research Council drew together to write "Alternatives for Groundwater Cleanup" in 1994 advocated that "measures to remove contaminants from zones where the release occurred and to contain contaminants that cannot be removed should be taken as soon as possible after the contamination occurs." Requirements for such measures have appeared in numerous bills in the past. The absence of a minimum requirement in the chairman's mark to control and reduce sources in cases where full restoration is technically impracticable, and to contain the plume, removes an assurance citizens have come to expect and will cause needless debate over what should be codified as a best practice.

Waiver from Protection?

Of continuing concern are conflicting provisions in the chairman's mark which seem to expand the "technical impracticability" waiver from current law to permit not only applicable requirements of other laws to be waived on the basis of cost, among other factors, but also cleanup levels established as necessary to protect human health and the environment at a site where applicable requirements are not. This standards are waived, the President shall select a "technically practicable" remedial action that "protects human health" and most closely achieves the protectiveness goals. The conflict in the language is confusing. We cannot afford any confusion over the fact that protection of human health and the environment is a fundamental mandate that must be met in all cases without exception.

In addition, by prescribing numeric risk goals, the bill would lock the Agency into current methods of expressing and measuring risk, which are in transition as the science is changing. Under the Agency's new cancer guidelines, there will be decreasing reliance on linear models which underlie the "risk range" Superfund currently uses for managing risks, and new units of measures, including "margin of exposure" will begin to be used. Protectiveness goals are best dealt with qualitatively, or left to the Agency to address in regulations or guidance.

The bill unnecessarily codifies current practice regarding how determinations of protectiveness are made, and leaves out the "point of departure" used to establish "safe" levels of carcinogens risks within the risk range of 10⁻⁶ and 10⁻⁴, by not explicitly addressing sensitive sub-populations, and by inappropriately linking the hazard index to threshold carcinogens, which we only use for noncarcinogens.

The Chairman's Mark Would Delay Cleanup

One issue upon which I think we would all agree is that the pace of cleanups should not be derailed. We are currently showing tremendous progress in addressing the current sites on the NPL, and strongly oppose any provisions that could negatively affect that progress.

Mandated ROD Reviews

I appreciate that the chairman's mark attempts to capture the "spirit" and features of the Agency's "Remedy Update" Administrative Reform, than did the extremely onerous remedy review provisions in the original S.8. Under current law, remedy updates have yielded impressive results, however I remain concerned that the regimented mandate the chairman's mark contains will still result in delays and disruptions to the program that are at odds with the Administration's commitment to speed the pace of cleanup. The artificial deadlines on petition submission and Agency review, the mandated role of the remedy review board, and the implied comment process all promise to transform the current administrative process that is

yielding \$340 million in cost savings in fiscal year 1996 and another \$280 million estimated to date for fiscal year 1997 into a resource-intensive diversion from clean-up.

While the remedy review provisions initially appear to provide discretion to the Agency in its reviews, this language is illusory. The chairman's mark requires the Agency to prioritize petitions, which in turn requires an evaluation of each petition against eight factors. As a result, the discretion provided in one portion of the provisions is effectively negated in another.

Based on our experience with the Remedy Update Reform and the National Remedy Review Board, our preliminary analysis indicates that the task of implementing the 180 day petition review and prioritization process could consume approximately 70 percent of our workforce of remedial project managers and policy experts for over a year, diverting attention from moving projects to completion. Keep in mind that remedy changes can precipitate changes in consent decrees and interagency agreements, which will also take time and divert attention away from cleanup—increasing, not reducing, transaction costs. I agree that appropriate remedy changes should be made, but I urge retention of the flexibility the current administrative process affords the Agency to balance “rework” of old decisions with forward progress at sites.

Prescriptive Remedy Review Board

The Remedy Review Board would certainly have a dramatically expanded workload under the chairman's mark. In addition to its role in reviewing past decisions, the Board would continue its efforts begun under the Administrative Reforms to review proposed remedial action decisions. Again, I am pleased with the endorsement of the Remedy Review Board reflected in its codification in the chairman's mark, but am concerned that some unhelpful prescription has been picked up in the translation. Specifically, The chairman's mark requires that fully one-third of all draft decisions the Board should be reviewed in any given year, a dramatic increase in workload from the approximately 10 percent of decisions the Board plans to review under its current criteria. The chairman's mark also adds a notice and comment process relating to the Board's recommendations to the opportunity to comment on the official Proposed Plan the public already has under current law, adding significant delay.

Overly Prescriptive Risk Assessments

The chairman's mark retains some troublesome features of S. 8's risk assessment provisions. Most notably, the over broad requirement for site-specific chemical data simply makes no sense. Toxicity, the primary type of chemical-specific information used in risk assessment, does not generally change from site to site. In addition, toxicity studies cost hundreds of thousands of dollars, and several years to conduct. Peer-reviewed Agency toxicity criteria should be used along with site-specific exposure information. Also, the requirement for “central, upper-bound and lower bound estimates” of risk for each facility are inappropriate for site-specific risk assessments, but rather apply to chemical-specific risk assessments like those found in IRIS or to be performed under the Safe Drinking Water Act.

Site-specific risk assessment in Superfund use Agency toxicity criteria along with site-specific measures of exposure. Superfund relies on a high-end estimate of exposure (between a central and upper-bound estimate) that neither minimizes nor exaggerates risks posed by contaminants at the site. This estimate, along with consideration of sensitive sub-populations, forms the basis for making cleanup decisions that will ensure protection of human health. Finally, the requirement for risk assessment to specify “each uncertainty identified in the process . . . and research that would assist in resolving the uncertainty” would lead to paralysis by analysis. Only significant uncertainties need to be identified to better inform the risk management decision.

The Chairman's Mark has Broad Liability Exemptions

While we are encouraged by the limited focus on parties whose liability we believe should be addressed, such as generators of municipal solid waste, *de micromis* generators, recyclers, and municipal owners of co-disposal landfills, the Administration continues to have several major concerns regarding many of the liability provisions of the chairman's mark of S. 8.

The revised legislation continues to exempt or limit the liability of parties that are viable and liable and should remain responsible for cleanup of their sites. As an example, the chairman's mark exempts generators and transporters of any waste, whether municipal solid waste (MSW) or extremely hazardous waste, found at a “co-disposal” site. This provision exempts parties regardless of the hazard asso-

ciated with their waste or the impact that waste may have on the cleanup. At the Delaware Sand and Gravel Site, for example, the chairman's mark likely would-exempt major industrial generators of hazardous substances merely because they chose to dispose of their hazardous waste at a site which accepted MSW.

The chairman's mark also continues to limit the liability of private owners and operators of "co-disposal" sites—a position EPA has never endorsed. Under the terms of the chairman's mark, major waste management companies that are liable, viable and understand the costs of this business, would be relieved of their liability. At many sites, this could mean that cleanup costs will be shifted to the Fund through the revised S.8's orphan share funding provisions. In fact, as the chairman's mark is currently written, the collective "co-disposal" provisions result in a de facto co-disposal carve out, which we believe is inconsistent with good public policy.

The co-disposal provisions raise other issues of concern. Under the chairman's mark, a "co-disposal" landfill is one which contains "predominantly" municipal solid waste. The term "predominantly" is not defined. The absence of a definition is certain to encourage litigation. Further, where a site continues to receive municipal solid waste, its status may change over time. These new and vague terms are fertile ground for litigation.

The small business exemption found in the chairman's mark is another example of an exemption that is broader than is needed to address the intended parties of concern. This provision, probably intended to exempt only those very small contributors of waste which we all agree should not be forced to incur the transaction costs associated with Superfund liability, goes well beyond exempting these contributors. Instead of blanketly exempting these parties, without regard to their contribution or company-specific circumstances, we support the use of other tools to address the liability of these parties, including a litigation moratorium on small businesses with an ability-to-pay problem; and exemption for small businesses who are generators or transporters of municipal solid waste; and penalties to discourage frivolous lawsuits against small businesses.

Further troubling aspects of the liability exemptions and limitations in the chairman's mark include the problem that they apply prospectively—effectively eliminating the incentive for sound waste management practices. Also, the liability provisions apply only to sites on the NPL, ignoring certain parties such as residential homeowners and small volume contributors at non-NPL sites that would still be liable for their wastes. Finally, the liability provisions do not eliminate contribution litigation against the parties most in need of such protection, such as the residential homeowners and small volume contributors described above. This violates the Administration's Principles, which seek to reduce litigation and transaction costs.

In addition, the liability exemptions and limitations in the chairman's mark, when read together with the Orphan Share Funding provisions, would create an enormous obligation for the Trust Fund and could divert funds from cleanups. Because orphan share funding is not provided from a source separate from cleanup dollars, cleanups will be competing for the same dollars as the Orphan Share claimants. To make matters worse, the chairman's mark provides that orphan share funding is an entitlement. As such, claims for orphan share funding would be legally superior to other claims against the Fund, including the costs of cleanups.

The chairman's mark also requires EPA to reimburse responsible parties for costs that exceed their allocated share—this includes in many cases, costs and work that parties have already agreed to perform. These provisions for "Fund Contribution" present several problems. First, they require EPA to repay recalcitrant parties working under an order in the same manner we would repay a cooperative party working under a consent decree. This would be a windfall to the recalcitrant parties. Second, these provisions require EPA to pay costs within 1 year. If large numbers of applications are received at once, this could cause funding shortfalls and resource drains resulting in major cleanup delays. Third, final settlements will be reopened and parties who have previously incurred the costs of negotiations will have to proceed through an allocation to determine their share of liability for the purpose of reimbursement. Such reconsideration of liability effectively duplicates transaction costs previously incurred.

Narrow and Unworkable "Illegal Activity" Exception

The chairman's mark attempts to prevent a person from claiming a liability exemption where a court determines, within the applicable statute of limitations, that the person violated a Federal or State law relating to the hazardous substances at issue. Because Superfund addresses the results of acts that frequently took place many decades before cleanup, and at a time when applicable laws may have been

unclear, proof of illegal or culpable behavior would be impossible at most sites, because the bill's language requires court action at the time of the activity.

The Allocation Process is Too Broad and Prescriptive

Though the chairman's mark simplified the allocations procedures and made clear that EPA can require a potentially responsible party to perform work at a site, the Administration continues to have a number of concerns with the allocations provisions. First, the large number of sites subject to a mandatory allocation will result in extraordinary allocation costs, will increase transaction costs, and will slow the settlement process.

The chairman's mark requires formal and prescriptive allocations at all multi-party sites on the NPL where post-enactment costs are outstanding (over 1,200 sites), even where the parties are exempt from liability under the revised S.8. In addition, under the chairman's mark, the allocator alone makes the determination as to which parties not already settled out are to be considered exempt or liable.

These provisions preclude EPA from protecting small volume contributors or parties with an inability to pay, and thus from protecting them from the transaction costs associated with an allocation. Finally, the revised S.8 allows no means for the allocation process to be set aside if some parties wish to settle, rather than proceed with the allocation. This allows just one party who is responsible for 5 percent of the costs to hold other parties hostage, even in cases where a settlement could be easily reached.

In 1994, as part of Administrative Reforms, EPA implemented an allocations pilot project at 12 Superfund sites. Although the pilots are not yet complete, much has been learned about the strengths and weaknesses of the allocations process. Based on this experience, EPA cannot support a mandatory allocations process at every multi-party site. For example, some responsible parties do not want to use an allocation process, even where EPA has offered orphan share compensation. Based on our experience with allocating and our allocation pilot projects, we believe that legislation should reduce transaction costs by promoting settlements and encouraging contribution allocation of costs among settling parties through a flexible, nonprescriptive process that makes effective use of available "orphan share" funding.

Other Liability Concerns

The chairman's mark of S.8 precludes Federal or administrative enforcement action at any facility that is subject to a State remedial action plan. The revised S.8 further requires that where a facility is not subject to a State remedial action plan, that is, in cases where the State is not taking the lead, all CERCLA section 106 orders issued by the U.S. relating to that facility cease to have effect after 90 days if the State does not affirmatively concur on the order. This would put a huge burden on the States, creates a duplicative system, and could disrupt cleanups. Each of these provisions inappropriately impose restrictions on the ability of the U.S. to enforce Federal law, and to act to protect public health and the environment.

Finally, we remain concerned with the very broad exemptions, and few limitations, placed on the liability of cleanup contractors.

The Chairman's Mark Provides General Support for Communities

The Administration supports many of the changes made to the Community Participation Title of the chairman's mark of S.8, which generally improves public participation in the Superfund decisionmaking process. However, the Administration is concerned with several omissions from the Title.

Lack of Public Health Support

The chairman's mark of S.8 fails to provide adequate support for public health concerns. The Administration supports the continued protection of human health of communities effected by Superfund sites through efforts of public health assessments, health effects studies, and other public health activities prescribed by law. Prior legislative proposals have provided transparency to the public regarding many of the Agency for Toxic Substances and Diseases Registry's (ATSDR's) responsibilities at Superfund sites.

The Chairman's Mark Provides Incomplete Support for States and Tribes

One area in which we seem to agree is our desire to provide greater involvement for States and Tribes in the Superfund program. While we support enhanced flexibility in accomplishing this goal, the provisions in the chairman's mark fail to ensure that authorities are transferred in a responsible manner. We do, however sup-

port the new provisions which allow States to request removal of sites from the NPL, with an appropriate role for EPA in responding to such a request.

Problematic State Delegation and Authorization Processes

The chairman's mark of S.8 provides a confusing array of opportunities for States to implement the Superfund program, including authorization, expedited authorization, delegation, and limited delegation. The chairman's mark may also make all of these opportunities unnecessary, because of provisions in the voluntary cleanup portion of the bill that seem to circumvent most requirements at Superfund sites, as discussed below. We believe that any transfer of responsibility should be accomplished in a responsible manner, taking into account individual State program characteristics, and should provide appropriate reviewable criteria as part of the transfer process. While the Administrator may review appropriate criteria as a part of the authorization process, we are extremely troubled by the criteria relating to expedited authorization.

Instead of relying on criteria which relate to the capability of a State to undertake Superfund cleanups, the limited criteria for expedited cleanups provide for self-certification and relate primarily to cosmetic aspects of State programs, such as whether the total number of employees in the State program exceeds 100, whether the length of time the State program has been in effect exceeds 10 years, or whether the number of response actions taken by the State program exceeds 200.

While these criteria may provide some insight into the State program, they do not justify the conclusive presumption of capability in the chairman's mark. For example, these facts provide no information about the capabilities of the State to conduct large scale Superfund site cleanups, the types of cleanups that have been performed, or even whether those cleanups were successful and to what degree. Given the ease of meeting the criteria required to receive expedited authorization, it is unlikely that a State would ever pursue more meaningful delegation or full authorization agreements with EPA.

We continue to believe, consistent with our Principles, that the best manner in which to transfer responsibility to the States is through a process which identifies a workable division of labor between States and EPA. Through this process, we can ensure protective cleanups for all Americans by allowing State and Federal programs to utilize their strengths where needed, without resorting to a hasty transfer of responsibilities or a cookie-cutter, one-size-fits-all approach.

Transfer of Responsibility is Approved by Default and Limits Citizen Access

Additionally, we remain concerned with the default approval process set out in the chairman's mark. With regard to delegations, the chairman's mark provides automatic approval of a State application if the Administrator does not approve or disapprove the application in a specified timeframe. Similar short timeframes also apply to applications for expedited authorization, resulting in permanent approvals without regard to ability, and with little accountability after the decision or lack of a decision. As a result, the Administrator, and any other person, lose all opportunity to challenge the certification in a judicial or administrative proceeding.

Even with the limited exceptions or extensions, the default approvals of State programs could have unintended consequences, and could even lead to a lack of protection of public health and the environment in cases where a State is automatically approved to take over a site because of the default provisions, but does not currently have the resources available to devote to the particular site.

Finally, the chairman's mark provides for no public notice or comment on a proposed approval or disapproval of a State application to take over the program. In the case of the chairman's mark, where the decision as to the lead regulatory agency is made on a site-specific basis, this is very troubling. In many cases, the public has very strong views about which agency is best suited to oversee the cleanup. The public is also barred from taking civil action against any person for any matter that has been transferred.

Limiting Ability to Respond to Emergency Removals

The chairman's mark requires EPA to give a State 48 hours notice before EPA can take action to perform emergency removal actions at non-Federal listed facilities, unless EPA determines that a public health or environmental emergency exists, or EPA determines that the State has failed to act within a reasonable period of time. Without regard to the vague terminology of the exceptions, even in situations that arguably might not meet the definitions of public health or environmental emergencies, 48 hours in the life of an emergency removal action can sometimes be an eternity. Within that timeframe, contamination can easily spread, causing increased cleanup costs and durations. Though the provisions allow EPA to act in circumstances where EPA determines that the State has unreasonably delayed its re-

sponse, any such delay can result in disrupted cleanups. These provisions, in concert with unrealistic delegation timeframes, could severely limit the emergency response system which has been so successful in responding to chemical spills, fires, and other emergencies.

Other State Issues

Besides the issues listed above, there are other potential problems with the provisions of the chairman's mark. For example, the new State cost share requirements appear to add significant costs to the Trust Fund by Limiting a State's responsibility for operation and maintenance costs to, at most, 10 percent. Finally, the chairman's mark provides overly generous incentives for State-managed cost recoveries, which may not adequately recognize the need to utilize recovered moneys to replenish the Superfund Trust Fund.

The Chairman's Mark Fails to Adequately Promote and Enhance Economic Redevelopment

One of the most important aspects of any Superfund legislation is its ability to promote and enhance economic redevelopment at Superfund sites. Because of this, EPA is very encouraged to see the inclusion of Brownfields provisions, as well as voluntary cleanup program provisions, within the chairman's mark. However, in reviewing the revisions to these provisions, concerns remain.

Brownfields Grants are Limited

Although the chairman's mark would establish grant programs for both brownfields site characterization and assessment and to capitalize revolving loan funds for brownfields site response actions, the funding authorization levels do not reflect the President's Fiscal Year 1998 budget request. As such, these new grant programs will be substantially under funded and fail to provide the opportunity for many communities to benefit from brownfields assessment and cleanup. Among the other elements of the draft which work against communities, is the limitation on funding per year. This provision will restrict and inhibit grant recipients from efficiently managing and benefiting from the grant itself.

The revised bill also retains onerous criteria for grant approval and grant application ranking that will prove difficult, in not impossible, to implement. These requirements will also work to the detriment of communities. In many cases, the information requested as part of the application process may not be available until after the brownfields processes of site investigation and assessment are completed? Similarly, ranking criteria requests call for information that simply cannot be forecast until cleanup at a brownfield site is completed. In addition, the bill excludes States from the list of eligible recipients for brownfields characterization grants. EPA's experience with the Brownfields Pilot Program has taught us that in the case of smaller communities, it may make more sense and be more efficient to provide the grants directly to States.

Voluntary Cleanup Program Concerns

The Administration is opposed to provisions in the chairman's mark regarding voluntary cleanup. Title I of the bill clearly undermines the need for States to pursue program authorization or delegation under Title II. The voluntary cleanup program is not designed to be, nor should it become; the primary vehicle for hazardous waste site cleanup in the United States. Under the Title I provisions, the elements of a qualifying State voluntary response program are only required if assistance is being sought. The bill should make clear that the Agency determines the adequacy of a State voluntary cleanup program.

A State voluntary cleanup program, as envisioned by the Agency, is one that serves as an alternative to conventional CERCLA or State Superfund-like enforcement approaches for cleaning up those sites which generally pose lower risk. It should not include higher risk sites of the type that historically have been listed on the NPL. The chairman's mark explicitly includes such sites as eligible for cleanup under voluntary programs and provides those and other sites a shield against Federal enforcement and many other current statutory requirements.

Title I allows States to use "remedial action plans" as a shield against Federal and citizen enforcement. There is no link between a "remedial action plan" and a "qualifying" State voluntary cleanup program.

It should be clear that progress toward the development and enhancement of State voluntary programs is a condition of funding under this program. Without such a requirement, the 5-year authorization for voluntary programs, which under the revised S.8, allows States to receive over one million dollars during this period, may be treated as an entitlement program by States.

The Administration remains opposed to the provisions in the chairman's mark that would severely limit EPA authority to exercise enforcement where there is a release of hazardous substances, whenever a State remedial action plan has been prepared, whether under a voluntary response program, or any other State program. Under the chairman's mark, the mere existence of such a cleanup plan eliminates any Federal enforcement authority—even where there may be an-imminent and substantial endangerment to human health and the environment. This compromise of public protection is alarming. Moreover, the new notification requirements with 48-hour time limitations seriously compromise EPA's ability to protect public health, welfare and the environment. These notification requirements will require the Agency to focus time and resources on administrative determinations, rather than on protecting public health and the environment in emergency situations. While EPA is burdened with these administrative requirements, the public may be unnecessarily exposed to substantial threats.

Finally, the level of community involvement provided by the chairman's mark is inadequate. The revised bill limits site specific community involvement to an "adequate opportunity." Unlike the current practices of EPA, DOD, DOE, and some States, this does not guarantee participation in all levels of the cleanup process, nor does it guarantee participation in determinations regarding end uses of the property. Coupled with the preclusion of citizen suits at all sites subject to a State remedial action plan, this limitation could result in shutting out citizens from decisions that affect their health and environment.

Other Concerns

The problems discussed above are not a complete list of problems in the chairman's mark of S.8. The revised bill significantly restricts restoration of natural resources injured as a result of hazardous waste contamination. Further, the revised bill prematurely limits Federal involvement in the effort to clean up hazardous waste sites by mandating that only a limited number of sites may be added to the National Priorities List (NPL) over the next several years. EPA estimates that hundreds of sites currently meet the eligibility criteria for NPL. Without adequate Federal involvement, these sites would become the responsibility of State and local governments that may not have the resources to address them.

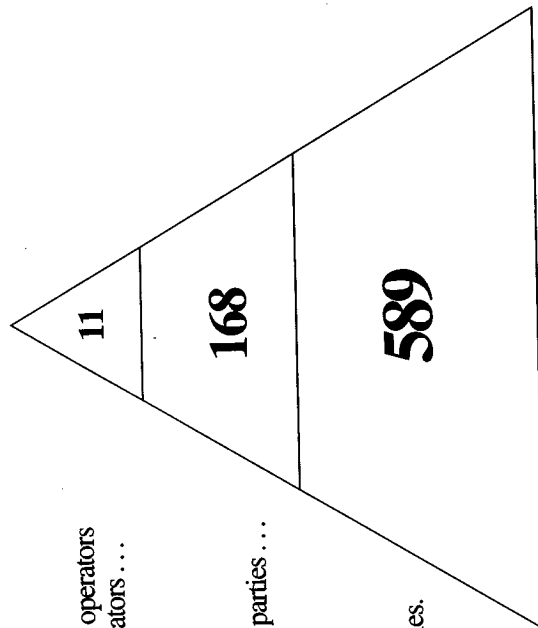
CONCLUSION

In light of the aforementioned concerns, the Clinton Administration strongly opposes the chairman's mark of S.8 in its current form.

However, we look forward to returning to a bipartisan process of legislative negotiations in which to resolve the Administration's concerns as quickly as possible so that responsible Superfund reform legislation can be enacted in the 105th Congress.

Mr. Chairman, thank you for this opportunity to address the committee. Now will be happy to answer any questions you or the other members may have.

Keystone Litigation Pyramid



EPA pursued the owner and operators
and 8 major industrial generators ...

... Who sued 168
demicronis and MSW parties ...

... Who sued 589 more parties.

RESPONSES OF CAROL BROWNER TO QUESTIONS FROM SENATOR BOXER

Question 1. I am concerned about the lack of an explicit requirement that cleanup standards be protective of children, the elderly, and other vulnerable subpopulations. What are your views on this and how do you think the bill's lowering of remediation standards will affect the protections given our children?

Response. EPA believes that sensitive subpopulations need to be explicitly protected in the statute. This protection will address those individuals who are particularly sensitive to the toxic effects of certain chemicals, or experience much higher exposures than the general population, such as children. Sensitive subpopulations are not limited, however, to children. Other examples of sensitive subpopulations could include subsistence fishermen, exposed to large amounts of contaminated fish, such as Vietnamese fishermen at the Lavaca Bay Superfund site in Texas; or individuals exposed to multiple sources of contamination. Because the chairman's mark of S.8 does not specifically address sensitive subpopulations, it does not ensure the more stringent protective measures needed for these at-risk individuals.

Question 2. I am concerned that the "hot spot" language in this bill favoring the containment of hazardous contamination over the treatment and cleanup of contamination will jeopardize treatment efforts at sites in California. Do you agree?

Response. EPA believes that the chairman's mark of S.8 will jeopardize treatment efforts at all Superfund sites, including those in California. EPA supports a statutory preference for treatment at all sites where the waste is highly toxic or highly mobile. Treatment of highly toxic or highly mobile waste offers advantages over containment or other measures; it helps ensure that any materials managed on-site over the long-term would not pose a serious threat to human health and the environment. And obviously, the more contaminated material that remains on-site and the higher the potential risks it poses, the less likely that productive reuse of that property, or significant portions of that property, will occur.

As a result, we are currently striving to implement these goals today, using treatment where necessary, at such sites as the Bayou Bonfuooca Site in Louisiana. At this site, EPA determined that incineration was necessary to treat creosote waste, including Benzo(a)pyrene, that had leaked into a bayou. The creosote mixture was so potent, that divers received second degree chemical burns from contact with the contaminated sediments. The contamination appeared to have killed all life in the bayou. Treatment was necessary at this site to permanently eliminate the threat from these materials.

While the chairman's mark of S.8 does include a limited preference for treatment, it is so restrictive as to provide virtually no preference. Specifically, a substantial burden of proof must be met before the preference can even be applied: a site-specific analysis must demonstrate that the material (1) cannot be reliably contained, and, (2) is highly toxic, and (3) is highly mobile, and, (4) that there is a reasonable probability that actual exposure will occur. In addition, the bill exempts landfills and mining sites from the preference.

While bills in the 103d Congress contained similar provisions, they were exceptions to a requirement to treat hot spots. As reflected in the chairman's mark, treatment would probably never even be considered for many sites that present a multitude of problems, some of which are amenable to treatment. Finally, the preference is neutralized by a conflicting provision, which states that institutional controls and engineering controls are to be considered on an equal basis to all other remedial actions, regardless of the hazard of the material in question.

The Administration's legislative reform principles support the idea of eliminating the mandate to utilize permanent solutions and treatment to the maximum extent practicable, in exchange for a new emphasis on long-term reliability, and retention of the preference for treatment of highly toxic or highly mobile waste. We believe such changes would eliminate the potential for "treatment for treatment's sake," but retain an appropriate presumption that materials posing the "principal threats" at sites due to the intrinsic hazards posed by their toxicity or mobility should be treated, unless impracticable.

Question 3. I am concerned about the groundwater cleanup provisions in this bill because they do not include an affirmative requirement that we treat the source of the groundwater contamination. Could you please express your specific concerns and explain why this requirement is important?

Response. EPA shares your concerns about the lack of an affirmative requirement to contain and reduce sources of pollution that cannot be eliminated entirely and may continue to release pollutants to ground or surface water. We also believe that the statute should contain a further requirement to contain the dissolved plume.

One issue on which there is a high degree of consensus is that restoration of an aquifer or part of an aquifer cannot occur unless new contamination is prevented from entering the groundwater. Given that a five-gallon bucket of the commonly used solvent trichloroethylene (TCE) can contaminate 800 million gallons of water at levels above drinking water standards, leading to enormous cleanup costs, it is imperative to control and minimize such sources. That is why the groundwater policies the Agency has issued under its Administrative Reform efforts have called for early control of both surface and subsurface sources as critical to successful groundwater remediation efforts. Surface sources include lagoons or landfills which may be leaching contaminants into groundwater. Effective control of such sources is one of the components critical to making monitored natural attenuation a viable cleanup option for some groundwaters.

Dense and light non-aqueous phase liquids, (DNAPLs and LNAPLs) are good examples of subsurface sources which can pose a greater threat to groundwater over time because of the potential for the contaminants to migrate and accumulate in less accessible zones. The diverse panel of experts the National Research Council drew together to write "Alternatives for Groundwater Cleanup" in 1994 advocated that "measures to remove contaminants from zones where the release occurred and to contain contaminants that cannot be removed should be taken as soon as possible after the contamination occurs." Requirements for such measures have appeared in numerous bills in the past. The absence of a minimum requirement in the chairman's mark of S.8 to control and reduce sources in cases where full restoration is technically impracticable, and to contain the plume, removes an assurance citizens have come to expect and will cause needless debate over what should be codified as a best practice.

Question 4. I am concerned about the lack of flexibility in the bill regarding the delegation and authorization of States. EPA is not given the option of partial delegation or de-authorization. What are your thoughts on this?

Response. Many aspects of the State role as established in Titles I and II in the chairman's mark of S.8 are of concern to me. The legislation requires EPA to approve or disapprove a State's application without the ability to set conditions related to that approval. If, at any time, EPA finds that a State does not meet certain criteria, the Agency may withdraw the program after meeting certain mandatory requirements, including, providing written notice, a 90-day period for the State to correct deficiencies and public notice and comment. This process, which we believe would minimally take 6 months, provides the only way for EPA to take independent action, except to address an emergency situation.

To repeat, except to address emergencies or to take enforcement action after making a finding that the State is unwilling or unable to act and obtaining a declaratory judgment, the Agency must formally withdraw a State's authority before taking action. These provisions establish a very confrontational procedure for dealing with disagreements. They also establish an "all or nothing at all" atmosphere that may work contrary to the interests of efficient site cleanups.

EPA believes that the State role in Superfund should be enhanced, and that this should occur in a manner that meets each State's interest and capabilities. A partnership agreement should clearly define who is in the lead at which sites and what statutory authorities will be used. Periodic program reviews should be conducted so that the partnership agreement can be adjusted quickly based on any changed budgets, statutes, expertise and site problems that need to be addressed.

The provisions of the chairman's mark of S.8 would allow States, even those without EPA approved programs to use the existence of "remedial action plans" as a shield against Federal enforcement. Title I (Brownfields Revitalization) preempts CERCLA government judicial and administrative enforcement actions, as well as private cost recovery actions at sites (including NPL sites) subject to "State plans" or "State remedial action plans." Moreover, the revised S.8 does not define "remedial action plans." In addition, it precludes EPA from taking enforcement action unless specified circumstances are met. In Title II (State Role) specifically, a State must request EPA assistance, or EPA must make "a determination that the State is unwilling or unable to take action at a facility at which there is an imminent threat of actual exposure" and EPA "obtains a declaratory judgment in U.S. district court that the State has failed to make reasonable . . . progress at the facility."

In addition, citizen suit actions are precluded at sites subject to State remedial action plan (Title I) or for which there has been a transfer of responsibility to the State (Title II). For releases at facilities *not* subject to a State plan, EPA must provide notice to the State 48 hours after issuing 106 orders. If the State fails to concur, the order will automatically cease to have force 90 days after issuance.

These provisions remove the safety net that the Federal Government provides at these toxic waste sites, and when coupled with other authorization/delegation provisions, unnecessarily establishes confrontation that could jeopardize human health and the environment and progress in cleaning up uncontrolled hazardous waste sites.

Question 5. I am concerned that the elimination of relevant and appropriate requirements or “RARs” could seriously hamper a State’s ability to clean up contaminated aquifers. More specifically, in California, we have a quickly developing issue in perchlorate contamination of groundwater aquifers. No national standard exists for perchlorate, nor is there enough information to confidently determine risk. Without the current use of RAR’s it is possible this contamination would go unaddressed. What effect would elimination of RAR’s have upon the EPA and States ability to protect public health?

Response. Under current law, EPA can establish protective cleanup levels where there are no standards (*i.e.*, applicable or relevant and appropriate requirements) for a chemical, where the Agency determines that levels more stringent than available ARARs are necessary to protect human health and the environment. We envision this authority to continue under a revised statute.

Practically speaking, elimination of relevant and appropriate requirements will put more emphasis on scientific, risk based approaches to support taking action at Superfund sites. However, there are mechanisms that can assist us in this approach. EPA has the ability to develop interim reference doses (*i.e.*, evaluation of toxicity) for specific chemicals that may pose a problem at a site. These interim reference doses can then be used to provide a risk basis for taking an action. It is not necessary for EPA or the State to develop a RAR on which to base an action needed to protect human health and the environment.

The perchlorate situation in California is an example of this. EPA initially developed a provisional reference dose in 1992. In 1995 EPA revised the reference dose based on new information. The State of California took EPA’s toxicity assessment, among other pieces of information, and developed an interim action level for perchlorate in drinking water. This action level is not a cleanup level, *per se*, for Superfund, although it does give further regulatory support for cleanup based on the toxicity information and site-specific exposure information. However, the determination to clean up a site and to what level can be supported by the need to protect human health and the environment, independent of relevant and appropriate requirements.

RESPONSES OF CAROL BROWNER TO QUESTIONS FROM SENATOR MOYNIHAN

Question 1. Many people believe that the agency is using unreasonable assumptions in its risk assessments at Superfund sites. What have you done to ensure that the very best science is brought to bear in Superfund risk assessments? What is the role of peer review in the risk assessment process for Superfund?

Response. Superfund has been criticized for “compounding conservative assumptions” in its risk assessments, when in fact, the assessments are based on average exposure concentrations and a mix of average and more conservative exposure values that target the “high-end” of the exposure distribution. Superfund risk assessments focus on “high-end” exposure estimates to ensure that the majority of the population on or near a site will be represented. Many critics would prefer that the Agency use “best” or “central tendency” estimates that address exposures to only half of the population, however, the Agency believes we should protect “most” individuals, and not just those with “average” exposures or less.

In addition, the Agency seeks to protect “sensitive subpopulations.” The term “sensitive subpopulation” refers to a segment of the general population that is at greater risk, because the individuals are either particularly sensitive to the toxic effects of certain chemicals, or they experience higher exposures than the general population. Lead is an example where the Superfund program uses the Integrated Exposure Uptake Biokinetic Model (IEUBK model) to address both increased sensitivity and increased exposure among children.

EPA supports the development of realistic risk assessments that address the exposure and risk to all segments of the community, not just the “average” individual. The focus should be on collecting the right site-specific data to tailor the risk assessment appropriately. After all, the true test of whether an assessment is “realistic” or not is the extent to which it addresses site-specific conditions and the concerns of the surrounding community. To that end, local communities are playing an ever increasing role in determining the future land use at sites, and shaping the exposure scenarios that are addressed in site-specific risk assessments.

The Agency is also interested in using the best science available in developing the toxicity information used in our Superfund risk assessments. For this reason, EPA maintains the Integrated Risk Information System (IRIS), which provides the Agency's most current toxicity evaluations for hundreds of chemicals. To ensure IRIS remains of high quality, EPA is engaging in a systemic reevaluation of chemicals in the system. This reevaluation includes a widespread request for new data and internal and external peer review.

Peer review is an important tool used in scientific disciplines to ensure that the best, most current thinking and information is used. However, it is not necessary, efficient, or appropriate to conduct peer review on every risk assessment at every Superfund site. A more efficient and appropriate use of peer review would be to review the guidance and practices of risk assessment for Superfund. It is for this reason that the current Superfund risk assessment guidance was submitted to the Science Advisory Board for review before it became final. The Soil Screening Guidance, developed for Superfund program use, was submitted to peer review as well as to the Scientific Advisory Board. These reviews resulted in useful changes to the guidance. EPA is also engaging a wide variety of stakeholders in the revision of the risk assessment guidances for Superfund. EPA has also made its revised cancer guidelines available for public comment, which gives scientific peers the opportunity to comment. All of these activities serve to ensure that the best science available will be used for Superfund risk assessments.

Question 2. What changes, if any, are needed to improve the existing natural resource damage provisions?

Response. The Administration strongly supports the NRD program administered by Federal, State, and Tribal trustees under CERCLA. Our experience with the program indicates that the public and its resources would benefit from a shift to a restoration-based approach which focuses the NRD program on restoration planning rather than litigation over monetized damage claims. To that end, the Administration believes there are two provisions that are essential to any responsible NRD legislation:

(1) Clarification of the statute of limitations for bringing an NRD claim. As the Administration has stated in its proposal, the existing statute of limitations for non-NPL facilities should be changed to 3 years from the date of completion of an assessment in accordance with the damage assessment regulation or the completion of a restoration plan adopted after adequate public notice. The existing statute of limitations for non-NPL facilities is 3 years after the later of the date of the discovery of the loss and its connection with the release, or the date on which the natural resource damage assessment regulations are promulgated. This provision has engendered a great deal of confusion and litigation. In some cases, trustees have felt compelled to file premature claims, before the scope of the needed restoration is even known, in order to guard against the most extreme and unfavorable interpretation of the current limitations period. When claims are filed prematurely, the NRD decision becomes focused on monetized damage claims, which is inconsistent with a restoration-based approach.

(2) An express provision for review of trustee restoration decisions on the basis of an administrative record. The Administration supports an open assessment process in which scientific and resources management decisions are made on the basis of the best information from all interested parties, including PRPs and the general public. Record review discourages tactical withholding of information by PRPs and dilatory litigation, and promotes the public's right to know. It should be made explicit that judicial review of assessments will be limited to the administrative record and that court's will uphold trustees selection of a restoration action unless it is arbitrary or capricious.

Question 3. In your view, how would the chairman's mark affect ongoing natural resource damage restoration efforts, such as the Hudson River?

Response. The chairman's mark would weaken the NRD program and make it difficult or impossible to protect and restore natural resources like the Hudson River. It would restrict damages for losses that occur from the time a hazardous substance release causes injury until the resource is restored. It would also eliminate consideration of nonuse values when determining restoration projects that compensate the public for the loss of natural resources. Failure to consider the total value of natural resources, not just their human use value, could result in the selection of restoration projects that significantly undercompensate the public, thus creating a perverse incentive for PRPs to take fewer precautions to prevent future spills in pristine areas, where direct human use is low, than in already degraded areas, where direct human use is higher. Finally, the chairman's mark would insure endless litigation over the scientific and resources management decisions of trustees.

RESPONSES OF CAROL BROWNER TO QUESTIONS FROM SENATOR GRAHAM

Question 1. A major concern about the Superfund program is the unfairness of imposing liability on municipalities, small businesses, individuals and companies for lawful waste disposal activity which occurred prior to the enactment of Superfund in November 1980. A related problem is requiring those entities which are viable today to pay for the large orphan share arising from PRPs which disposed of waste decades ago but are no longer in business or cannot be located. In light of these inequities, my general question is: Wouldn't we make Superfund fairer if we substantially reduced PRP liability for lawful disposal activities occurring prior to 1981, particularly if there is an acceptable funding mechanism to pay for this reform?

Response. One of the core principles I believe we must adhere to in Superfund reform is that the parties who contributed to the contamination, not the taxpayer, should contribute to the cleanup. The proposal you suggest does not adhere to this principle.

You suggest by your question that fairness would be improved by considering the legality of the behavior that resulted in contamination. I disagree. Under this construct, parties that undertook egregious behavior—that resulted in contamination serious enough to require a Superfund cleanup could escape Superfund liability and responsibility for cleanup. Proof of illegal or culpable behavior may be impossible at most sites. Since Superfund addresses the results of acts that frequently took place many decades ago, documentary evidence is typically scarce or non-existent. Witnesses are often unavailable or have poor recollection of the behavior that lead to the contamination. In most cases, it may not be clear what law would apply. Congress created Superfund in large part because existing laws were inadequate to address abandoned hazardous waste sites. In many cases, Superfund sites were created by poor waste management practices that were "lawful" at the time because of the lack of any laws governing hazardous waste disposal. Superfund liability is based upon responsibility. Parties are held responsible for contributing to the creation of hazardous waste sites that pose threats to human health and the environment.

You also suggest that liability for activities occurring prior to 1981 could be treated differently than that liability associated with activities which occurred after that date. Nearly 70 percent of the activity that resulted in the contamination at Superfund sites occurred prior to 1981. A "cutoff" date of 1981, would result in substantial unfairness to parties that have accepted cleanup responsibility and reached settlement in good faith, by conferring a financial benefit to many parties that have avoided their cleanup responsibility through litigation.

I share your concern about the potential impact of a large orphan share on settling responsible parties. To address that concern, absent reauthorizing legislation with sufficient orphan share funding, EPA has instituted an orphan share policy to compensate settling parties. Under our policy, in all remedial design/remedial action settlement negotiations, we offer to compensate settling parties by forgiving past costs and future oversight costs up to 25 percent of the orphan share. Although this is the extent to which we believe we can compensate parties without additional appropriations, we realize that this temporary measure does not go far enough. For this reason, we have proposed that legislation provide for a separate, mandatory spending account to fund the orphan share, *i.e.*, the liability attributed to insolvent and defunct parties, and to fund the difference between the share of liability attributed to parties with an inability to pay their full share, and the amount these parties actually pay.

Question 2. To achieve affordable liability reform, has any thought been given to a compromise solution where 50 percent of future PRP liability for lawful pre-1981 disposal is assigned to an "orphan share" which is paid for by the Superfund or other credible funding mechanism?

Response. As discussed in question 1, we do not consider a proposal that eliminates or reduces liability based exclusively on a date, or the legality of disposal, to be fair or responsible. Such an approach would potentially result in an abandonment of the principle that the parties responsible for the contamination should be responsible for the cleanup.

Question 3. To pay for liability reform, we have discussed a number of proposals in the past, including a modest supplemental insurance fund. One way of creating a "win-win" situation for PRPs and their insurers would be for PRPs, in exchange for obtaining a 50-percent reduction in pre-1981 liability at particular sites, to give up their insurance claims at those sites. Wouldn't this kind of proposal be worth exploring as a basis for creating a limited insurance fund to help achieve fair Superfund reform?

Response. In the past, EPA has supported an insurance settlement fund to resolve the insurance coverage litigation that arose from the disposal of hazardous wastes prior to 1986. This proposal had been accepted by segments of the insurance industry. Although the idea has not been revisited since the 103d Congress, I would certainly not foreclose the discussion of such a fund. However, as I have indicated, I have serious concerns regarding the use of any "cutoff" date for the determination of Superfund liability.

RESPONSES OF CAROL BROWNER TO QUESTIONS FROM SENATOR ALLARD

Question 1. What is the Administration's position on H.R. 1195, legislation which would explicitly waive the Federal Government's sovereign immunity under CERCLA and ensure that Federal facilities comply with State cleanup standards?

Response. This response is undergoing OMB clearance.

Question 2. Let me give you a situation in Colorado that highlights the need for Federal facility legislation. Several years ago the EPA issued an Emergency Removal Order for a 22,000 cubic feet of contamination material from a site on the Colorado School of Mines Campus where EPA, DoD, DOE, and Bureau of Mines had conducted research.

Despite the fact that EPA, DoD and DOE contributed to the contamination of the material, their involvement was never investigated by EPA.

Don't you think it's inappropriate for EPA to be the judge of whether they (the EPA) should be held financially responsible for cleanup of areas they contaminated? Isn't that why we should pass legislation similar to H.R. 1195?

Response. EPA is aggressive in ensuring that Federal PRPs fully participate in all response actions and settlement discussions. It is EPA's policy to issue notice letters and administrative orders where appropriate to Federal agencies. (See, e.g., EPA's Interim CERCLA Settlement Policy, 50 Fed. Reg. At 5044, February 5, 1985.) This policy has been reiterated on several occasions, most recently in EPA's August 2, 1996 memorandum establishing procedures for the Superfund Reform designed to ensure equitable issuance of CERCLA 106 cleanup orders. In the case of the Colorado School of Mines Site, EPA sent notice letters to the Federal PRPs who may have contributed significantly to site conditions and worked with them on an almost daily basis to negotiate an administrative order on consent. For a variety of reasons, these negotiations failed and EPA issued unilateral administrative orders to the other parties. Under the applicable Executive Order signed by President Reagan that delegated CERCLA order authority, EPA must go through additional procedures when issuing non-consensual orders to Federal parties.

Specifically, the Department of Justice must concur with any EPA proposal for the issuance of such orders. (See, e.g., "Procedures and Criteria for Department of Justice Concurrence in EPA Administrative Orders to Federal Agencies," December 22, 1988.) In the School of Mines case, EPA staff spoke with DOJ concerning this procedure and the involvement of Federal PRPs at the site. EPA believed that the now-defunct Bureau of Mines (BOM) was the one non-*de minimis* Federal PRP that should receive a unilateral administrative order. DOJ indicated that rather than the issuance of an order, it would ensure that BOM would work closely with the private PRPs and fully participate in settlement negotiations.

I believe you have not been given an accurate explanation of EPA's involvement in the settlement of this case. In cases where EPA finds no documented evidence of liability, EPA eliminates the party in question from further consideration as a PRP. Where EPA has evidence that a party sent hazardous substances to a site, but the amount could not be determined, EPA assigns a standard amount (50 pounds) to that waste shipment. In this case, EPA has received no special treatment as a PRP. In fact, assuming the School of Mines information did rise to the level of documentation considered adequate by EPA, which it frankly does not, EPA would be eligible for a *de minimis* settlement. In an attempt to resolve this matter expeditiously, EPA is shouldering a much greater proportion of liability than can reasonably be established by the available documentary evidence. EPA's settlement offer will benefit all PRPs, including the School of Mines and the State. While EPA is not privy to the details of the PRP settlement, it stands to reason that EPA's agreement to forego \$185,000 of its response costs associated with site cleanup will reduce the total costs that are to be divided among all the PRPs.

Question 3. In the situation, above the Bureau of Mines admitted responsibility for contamination of the 22,000 cubic feet. Yet when the emergency removal order went out it only went to 12 private parties, the State, and the School of Mines. Can you give any possible reason why EPA wouldn't serve another Federal agency?

Response. EPA engaged in significant fact finding efforts to identify Federal and private PRPs at the site. EPA followed our standard procedure when investigating PRPs. This procedure required that EPA: (1) request all existing documentation relating to the Site from the owner/operator of the Site; (2) follow up on the information received from the Site by sending information requests to specific parties mentioned in that documentation who appear to have some liability; and (3) gather outside information relating to the Site or specific PRPs where available.

It is not uncommon, when dealing with activities which occurred 10 to 15 years prior to the initiation of EPA's cleanup activities, to encounter difficulties in locating documentation in support of a case against a party. For the School of Mines case, only a small percentage of the non-Federal parties contacted by EPA were able to provide documentation regarding hazardous substances they sent to the site. Like the private PRPs, many of the Federal agencies had difficulty identifying any connection to the site. EPA and other Federal agencies have record retention requirements and procedures which provide for the destruction of certain documents, such as bid and grant proposals, after specified periods of time. Congress authorized the promulgation of these procedures in 44 U.S.C. § 3303. Other documents which are considered permanent are eventually transferred to the Federal Records Center and then to the National Archives. Where EPA had specific information about projects performed by Federal agencies, the agencies were largely successful in locating additional records.

Question 4. Isn't this an example that illustrates the Federal Government doesn't enforce against themselves, isn't it true that no matter how responsible another Federal agency is, EPA would not force them to comply with laws the private sector should comply with?

Response. This response is undergoing OMB clearance.

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September 18, 1997

The Honorable John Chafee
 Chairman
 Committee on Environment and Public Works
 United States Senate
 Washington, D.C. 20510

Dear Mr. Chairman:

CSX Transportation, Inc. ("CSXT") submits these comments in connection with the Committee's September 4 hearing on Superfund Reauthorization. Specifically, we would like to respond to some erroneous comments by EPA Administrator Carol Browner regarding our involvement in a Superfund site known as "Keystone." We understand that the EPA is aware of the error and also intends to correct the record.

Background

CSX Corporation, the parent company of CSXT, played no role with regard to the Keystone site. CSXT's role at the site has always been as a *de minimis* party. In September of 1992, CSXT was one of the eight parties that signed a *de minimis* consent decree with the Department of Justice and EPA. CSXT was identified as one of the smallest contributors among the *de minimis* parties, and was assigned \$37,660 to cash out of the site. The basis for CSXT's allocation was the company's own CERCLA Section 104(e) response, which indicated that Keystone Sanitation picked up routine trash from the railroad, with some used filters and rags mixed in. Although several other parties came under fire for their 104(e) responses, no party ever challenged either the volume or the nature of CSXT's waste.

Entry of the *de minimis* decree was held up primarily by the large volume parties' disruptive efforts. In early 1993, the United States sued a group of a dozen or so companies, which were *large* contributors to the site. *United States v. Keystone Sanitation Co., et al*, No. 1-CV-93-1482 (M.D. Pa.). Subsequently, on May 5, 1993, the United States finally lodged the *de minimis* consent decree in a separate action. *United States v. Borough of LeMoyne, et al*, No. 4-CV-93-0667. The *de minimis* decree was entered on November 17, 1994, but not before the original *large* contributor defendants in the *Keystone Sanitation* case brought a third-party contribution action against some 160 defendants, including CSXT and the seven other *de minimis* parties. On November 23, 1994, the judge in that action issued an order for the original defendants to show cause why the third-party complaints against the eight *de minimis* parties should not be dismissed. In response, on December 16, 1994, the third-party plaintiffs dismissed the case against the eight *de minimis* parties, and CSXT's role in the case effectively ended.

Administrator Browner's Testimony

Administrator Browner testified that EPA had sued eleven parties at the site which, based on EPA's documentation, were the sources of "the lion's share of the hazardous waste at the site". She further stated that the eleven parties "unfortunately, did turn around and seek contribution for clean-up cost from 168 other parties". She also stated that the 11 companies sent "a very large amount of hazardous and toxic waste [to the site], and you had others sending garbage, municipal solid waste".

However, the Administrator then made a series of erroneous statements regarding the role of CSXT's parent company in the case:

- **"One of the companies in the 11 here is CSX, a very large operation."**

CSX was *not* one of the 11 original defendants sued by the government. Rather, CSXT was one of the more than 160 third-party defendants sued by the original defendants.

- **"They [CSX] were sending large volumes of hazardous waste to the landfill."**

This, too, is incorrect. CSXT sent primarily trash and rubbish to the landfill, arguably with small amounts of hazardous substances mixed in.

- **"They [CSX] would be off the hook, as you say, for any clean-up costs at this landfill under a carve-out disposal."**

CSXT has already cashed out of the site as a *de minimis* party, not as a large party seeking a carve-out settlement.

- **"If they [CSX] had sent it to their own site, if they'd kept it on their property and that had created a Superfund site, they would be responsible for the clean-up costs."**

It is true in the normal instance that a party who disposes of waste on its own property, which then becomes a Superfund site, is liable for clean-up costs. However, the nature of CSXT's waste in this case was largely benign, and it is a stretch to conclude that CSXT's waste alone would have caused attention under the Superfund program.

- **"If you take this site as an example and say, nobody pays anything to cover the clean-up cost, nobody pays their fair share, including the very large contributors of hazardous waste, and that cost comes to the taxpayers, it is quite significant."**

CSXT paid \$37,660 as a *de minimis* settler. That amount was determined by EPA to be CSXT's fair share.

The Honorable John Chafee

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September 18, 1997

We appreciate your assistance in correcting the record with regard to these erroneous comments. If you have any questions, please do not hesitate to call.

Very truly yours,


Pamela E. Savage

cy: The Honorable Max Baucus

PREPARED STATEMENT OF TERRY D. GARCIA, ACTING ASSISTANT SECRETARY FOR
OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRA-
TION, DEPARTMENT OF COMMERCE

Mr. Chairman and members of the committee, I appreciate the opportunity to submit testimony for the record on behalf of the Federal natural resource trustees concerning the proposal recently circulated by the committee Staff (draft chairman's mark dated August 28, 1997) for reforming the natural resource damages (NRD) provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). I am Terry D. Garcia, Acting Assistant Secretary for Oceans and Atmosphere in the Department of Commerce, with responsibility for the National Oceanic and Atmospheric Administration (NOAA). I am presenting this testimony on behalf of the Federal agencies that act as trustees for natural resources under CERCLA. Carol M. Browner, Administrator of the Environmental Protection Agency (EPA), will present testimony on other aspects of the committee's proposal.

INTRODUCTION AND SUMMARY

At the outset, I and my Administration colleagues would like to express our gratitude to the chairman and to the committee for the constituent outreach process and the bipartisan process of negotiation that the Majority has undertaken with the Minority and the Administration to achieve a Superfund reform bill that has broad bipartisan support. We are disappointed that this process has been suspended, and we would urge that the committee resume that process at the earliest possible date following these proceedings. I am confident that the dialog that the committee has established with the Federal natural resource trustees will result in broadly supported, responsible provisions addressing NRD, and the Administration is committed to working with the committee and affected stakeholders to that end.

The Administration would also like to commend the committee for the many improvements in this draft NRD title when compared to S. 8, the Superfund bill previously before the committee. The changes reflected in the current draft reflect a concerted effort by the committee to respond to some of the strong objections that the Administration and stakeholders have expressed concerning S. 8. For example, this draft includes much-improved provisions concerning consistency between natural resource restoration and response. Significant changes to the "phased payment" proposal make this provision compatible with current enforcement practice. The provision for a "lead administrative trustee," in lieu of a lead decisionmaking trustee, responds to concerns raised by Federal, State, and Tribal trustees concerning recognition of their respective trust responsibilities. Most notably, this draft adopts the well-established "cost-effective" criterion in place of the vague, ill-considered, and onerous "cost-reasonable" criterion that S. 8 imposed on restoration decisions, which threatened to mire NRD cases in greater monetization of damages, at the expense of the Administration's restoration-based approach to NRD.

We also have been heartened by the committee's continued effort to develop two provisions that are essential to any responsible NRD legislation: an appropriate clarification of the statute of limitations; and express provision for review of trustee restoration decisions (as distinct from issues of liability) on the basis of an administrative record. However, for reasons stated below, we believe that these two aspects of the current proposal remain seriously flawed. Indeed, one of the most salutary aspects of S. 8, the critical provision stating that judicial review of trustee decisions will be on the basis of the administrative record, has, quite inexplicably, been deleted. If this deletion was purposeful, it is one of the areas where this draft NRD title is moving decidedly in the wrong direction. Nonetheless, assuming that this deletion does not import a change in policy, we remain hopeful that our differences may center on issues of technical detail and implementation rather than on fundamental policy disagreements, and that we might readily reach consensus if negotiations resume.

Despite the substantial progress that the proposal reflects, however, the Administration would have to oppose this proposal strongly if it were to be considered for mark-up in its current form, primarily for two reasons. First, this bill continues to include S. 8's most odious feature: unwarranted restrictions on the range of values that trustees may consider in deciding the appropriate steps to achieve full restoration of the losses that communities suffer when natural resources are injured, lost, or destroyed by a release of hazardous substances. Second, the failure to address clearly the Administration's concerns with respect to the statute of limitations and record review issues would defeat the Administration's effort to reform its NRD programs in a manner that focuses these programs on restoration, because it creates

new incentives to use litigation as a means of delaying or avoiding restoration obligations.

We would also note that the Administration was given an incredibly short space of time to review the draft; therefore, we have not had adequate time to consider its full implications. We are also concerned that the committee is not soliciting the views of Tribes. The Administration continues to advocate the adoption of the NRD legislative reform proposal transmitted to the committee on October 7, 1996. The Administration stands ready to resume discussions to develop legislation that builds on the progress reflected in the current committee draft and more fully incorporates the essential features of the Administration's proposal.

PROGRAMMATIC OVERVIEW

At this point, the committee is aware of the important role that NOAA and other natural resource trustees serve in restoring natural resources that have been injured or lost as a result of a release of hazardous substances. For convenience, I would refer the committee to my testimony for the record at the committee's previous hearing, which focused on S.8 (testimony dated March 5, 1997, by Terry D. Garcia, on behalf of the Department of Commerce, the Department of the Interior, The Department of Agriculture, the Department of Energy, and the Department of Defense).

The goal of the NRD program under CERCLA is to ensure that the nation's valuable public trust inheritance is passed on for the use and benefit of future generations. Under the statute, natural resource trustees include not only Federal agencies like NOAA, but also the States and Indian Tribes, all of whom act as stewards of natural resources on behalf of the public. In fulfilling their trust responsibilities to affected communities, the trustees typically seek both "primary restoration" (to return natural resources to the condition that would have existed but for the release of hazardous substances), and "compensatory restoration" (to restore the natural resource services and amenities that communities lose from the time of the release until the completion of primary restoration).

CERCLA's provision for both primary and compensatory restoration reflects the significant role that natural resources play in many communities affected by releases of hazardous substances. Natural resources are essential to the hunting and fishing that sustain the economic life of many communities, and the quality of life in many others. Consequently, the NRD provisions of CERCLA are important to the future of many communities and particular industries. Commercial fishermen are depending on NOAA's restoration of sediment in the Montrose open-water DDT site off southern California, and fish habitat in Panther Creek at the Blackbird mine site in Idaho. Small businesses like charter boat operators in Tacoma, Washington, are depending on the Department of the Interior, the Department of Commerce, and the State of Washington to revitalize the commercial and recreational fishing industry in Commencement Bay. To date, only 5 percent of all sites listed on the National Priorities List (NPL) have required restoration in addition to remediation. However, in some cases, the future of entire regions may depend on the effectiveness of CERCLA's NRD provisions: Anaconda, Montana, whose State government is pursuing natural resource damage claims to restore natural resources in the Clark Fork River Basin, anxiously awaits restoration of natural resources that are essential to the future of its angling and tourist trades, knowing that their economic future hangs in the balance.

Accordingly, the Administration strongly supports the NRD programs administered by Federal, State, and Tribal trustees under CERCLA. The Administration has strongly opposed proposals, like those seen in S.8, that would undermine the trustees' efforts to replace or restore injured natural resources. Nonetheless, we agree that certain legislative reforms may be appropriate to strengthen the program. We have been pleased to participate in the committee's process of discussing the concerns of a range of stakeholders, and look forward to developing a bipartisan proposal on NRD that has broad support. We also believe that many of our administrative efforts to reform the NRD program can provide an appropriate template and point of reference for legislative change.

For example, our shift to a "restoration-based" approach, in which the focus of the NRD program is on restoration planning rather than litigation over monetized damage claims, is reflected in both the Administration's proposal and, to some extent, in the committee's draft NRD title. The Administration is currently embarking on a broad effort to ensure greater coordination between trustees and response agencies, such as the EPA and the Coast Guard, so that response actions and natural resource restoration are fully coordinated. In these and other efforts, we are seeking to incorporate the views of the committee as well as those of affected constituencies,

including States and Tribes, environmental and community groups, and industry. We believe that our administrative reform efforts have advanced the legislative reform dialog, and we look forward to working with the committee as our administrative reform efforts continue.

SPECIFIC OBJECTIONS TO THE CURRENT DRAFT NRD TITLE

1. Restrictions on Interim Loss Compensation

The inclusion in the current committee draft of numerous restrictions on the values that may be considered by trustees in determining the appropriate level of primary and compensatory restoration of natural resources plainly violates the Administration's principles for legislative reform of CERCLA, which were provided to this committee by Administrator Browner on May 7, 1997. As articulated in those principles, the Administration strongly opposes "repeal of all or part of the current liability standards" as well as any "limitation on the type of values that may be considered in determining the scope or scale of restoration or damages."

Under existing law, natural resource trustees are authorized to recover frill compensation for the public's interim loss of resource services from the date that a natural resource is injured by a hazardous substance release until the date the resource has frilly recovered. These recoveries compensate the public for real, and often significant, losses that are not addressed by restoring injured resources to baseline many years after the injury first occurred. A community that has lost its opportunity to fish a stream, hike a trail, or enjoy a spectacular and pristine vista because of a hazardous substance release is not made whole by the promise of primary restoration that may only occur years—or even decades—in the future. For example, at Lavaca Bay, Texas, a ban on harvesting crab, oyster, and finfish has been in place since 1988 due to mercury contamination. It is unacceptable to deny the affected community compensation—in the form of restoration, replacement, or acquisition of equivalent resources—for the loss of nearly a decade of fishery closure. Such long periods of interim loss can be devastating to local economies that depend on revenues generated by their natural resource base.

Further, the longer it takes before baseline is restored, the greater the interim loss is for the affected community. The absence of frill compensation for this loss creates an incentive for potentially responsible parties (PRPs) to delay restoration and engage in tactical litigation to defer its restoration obligations, because the affected community is asked to bear the entire cost of the delay. Providing frill compensation for interim loss, by contrast, gives PRPs an effective incentive for initiating, implementing, and completing restoration measures in a timely manner.

Restrictions on compensatory restoration also tend to distort the decisionmaking process for trustees in selecting primary restoration alternatives that satisfy their trust responsibilities. For example, there are many cases where the most appropriate primary restoration approach is to rely on natural recovery, due to the high cost and technical difficulty presented by other alternatives. This is the case with respect to the New Bedford harbor restoration, following extensive contamination of the harbor by PCBs. Reliance on natural recovery may indeed be the preferable alternative in such cases, but only if the trustees have authority to take appropriate steps to compensate for interim loss. In the absence of such authority, trustees may be discouraged from relying on natural recovery, because trustees cannot satisfy their trust responsibilities through the adoption of a natural recovery option that results in more protracted interim losses that cannot be frilly compensated. I would note that affected communities are unlikely to accept natural recovery options where provisions for interim loss compensation are inadequate.

There are two provisions in the draft NRD title that could eliminate recovery for interim losses altogether. The title limits the measure of natural resource damages to "the cost of restoration, replacement, or acquisition of the equivalent of a natural resource that suffers injury, destruction, or loss caused by a release" (p. 230, lines 9–17). The title also states that "[t]he goal of any restoration shall be to restore an injured, destroyed, or lost natural resource to the condition that the natural resource would have been in but for the release of a hazardous substance" (p. 238, lines 21–25). These two provisions taken together could be construed as eliminating compensatory restoration, because such restoration is not intended to return injured resources to their baseline (but-for-the-release) condition. Instead, compensatory restoration is designed to provide affected communities with the natural resource services and amenities they would have enjoyed but for the release.

2. Provision for "Temporary Replacement"

The draft title does make allowance for some interim loss compensation by authorizing recovery of the costs of "temporary replacement of the services provided

by the injured, destroyed, or lost natural resource” (p. 230, lines 17–20, also p. 240, lines 13–17). However, if this provision is intended to provide redress for the interim losses that members of the public incur when their natural resources are despoiled, it is woefully inadequate, for at least three reasons.

First, limiting compensatory restoration to temporary replacement of the services lost could be read as restricting trustees to addressing only those interim losses that can be offset prospectively. Such a reading would unfairly and arbitrarily bar the public due compensation for losses that accrued before trustees were able to determine whether particular natural resource injuries had in fact been caused by a particular release from a specific facility and to select appropriate restoration projects.

Second, the draft title’s reference to “replacement of the lost services” could eliminate needed flexibility to undertake compensatory restoration that provides services different than those lost. In some cases, trustees cannot replace the same services as those lost (*e.g.*, a unique park has been closed). In others, it would not make sense for the trustees to do so (*e.g.*, a fishing stream is closed, but enhancing access on a substitute stream would threaten populations in the other stream). In such cases, trustees should retain the ability to consider projects that enhance the level of resource services available to the public but do not replace the same services as those lost.

Third, the draft title’s reference to “temporary” replacement may prohibit trustees from considering worthwhile projects that are appropriately scaled and discounted to provide the same total quantity of services as those lost in the interim, yet result in a permanent improvement in resource services. For example, if 50 acres of wetland are lost for 10 years, trustees should not be restricted to the unrealistic option of acquiring or constructing 50 replacement acres for only 10 years. Instead trustees should have the flexibility to consider permanent acquisition of additional wetlands of less than 50 acres that provide services comparable to those that the 50 acres would have provided during that 10-year period.

Reliable and valid methods exist for determining the appropriate scale of such projects, and trustees should be allowed to continue using them.

3. *Ban on Consideration of Nonuse Values*

The draft title states that “[t]here shall be no recovery under this Act for any impairment of nonuse values” (p. 231, lines 1–3). This ban on compensation for nonuse losses is an unacceptable limitation on the type of values that may be considered in determining the scale of restoration. This provision could prevent adequate compensation for injuries to the unique or pristine natural resources we treasure the most.

There is no debate over whether people derive value from natural resources beyond their utility for immediate and direct human use. This fact is demonstrated whenever individuals make charitable donations or support government regulation and spending for the protection of species and places they themselves do not see or visit. Some natural resources, such as Katmai Wilderness Area in Alaska, are valued by the public specifically because they have escaped human use. Other resources are heavily used but that use represents only a fraction of the benefits the public derives from them. Units of the National Park System, such as Yellowstone National Park, and State parks, such as Anza Borrego Desert in California, were established in explicit recognition of the value we receive from ensuring that our grandchildren and our grandchildren’s children will be able to enjoy the same experience we do when we visit these special areas. We derive value from simply knowing that our public natural resources exist unimpaired, for the sake of future generations and the integrity of the global ecosystem.

This fact was vividly illustrated following the *EXXON VALDEZ* oil spill in Prince William Sound, Alaska. Prince William Sound, with its pristine natural beauty, is a national treasure, but few would contend that its value (and the losses to the public) could be adequately measured by quantifying direct human use of the sound for recreation or commerce. The public response to that spill, and the insistence by the trustees and the public that there be full compensatory restoration, reflects the public’s very strong sense of values beyond those measured by actual human use of a resource.

Whenever natural resources are injured by contamination, the public may experience a reduction in nonuse value. These reductions can be very significant when a unique resource has been injured, or when restoration is slow or will never return the resource to baseline. Under existing law, trustees may consider nonuse values when determining restoration projects that compensate for interim losses. Retention of this authority is crucial to ensuring that the public is made whole after a hazardous substance release.

As mentioned above, the Administration supports codifying a restoration-based approach to compensating for interim loss. Under such an approach, if a trustee can provide the same services as those lost, the trustee need not explicitly determine whether and how much use or nonuse value was lost. The trustee simply selects a project that generates the same quantity of services as those lost over time and asserts a claim based on the cost of implementing the project. However, as also discussed above, sometimes trustees cannot create the same services as those lost. This situation arises whenever a unique resource is injured, which is also one of the situations in which nonuse losses are likely to be most significant. In these cases, trustees should be allowed to undertake compensatory restoration projects that improve the level of other resource services available to the public, but only if such improvements are commensurate with the losses resulting from the release. To ensure that such projects are appropriately scaled, trustees need to compare quantities of services lost to quantities of services gained, and economic valuation may, in some cases, be the best method for making this comparison. In such cases, failure to consider the total value of the natural resources (use value plus nonuse value) could result in the selection of projects that significantly undercompensate the public, thus creating an incentive for PRPs to take fewer precautions to prevent future spills in pristine areas, where direct human use is low, than in already degraded areas, where direct human use is higher.

The draft title's restriction on nonuse values may also prevent trustees from selecting appropriate primary restoration actions. While the Administration agrees that imposition of a rigid, quantitative cost-benefit test on restoration selection is inappropriate, trustees often need to make some evaluation of benefits for purposes of determining the cost-effectiveness of different alternatives. Barring any consideration of nonuse values in that evaluation may unfairly bias the restoration selection process away from active restoration, even if natural recovery takes decades and notwithstanding the very real and significant human and ecological losses incurred in the interim.

Furthermore, the draft title may impose an unwarranted burden on trustees even when they are not attempting to explicitly address lost nonuse values. The ban on compensation for impairment of nonuse values could be read as requiring trustees to demonstrate that a restoration project compensates only for impairment of use values.

Restoration projects designed to restore use values may incidentally restore some of the lost nonuse values. Therefore, it may be difficult to demonstrate that a restoration project only addresses lost use, particularly where the project is restoring services, such as habitat, that are not directly used by humans but are used by other resources.

4. Statute of Limitations

As stated above, an essential component of any responsible NRD reform bill is an appropriate clarification of the statute of limitations. The existing statute of limitations for NRD claims at sites other than Federal facilities, facilities listed on the NPL, and facilities at which a remedial action is otherwise scheduled, is 3 years after the later of: (1) the date of the discovery of the loss and its connection with the release; or (2) the date on which the natural resource damage assessment regulations are promulgated. This provision has engendered a great deal of confusion and litigation. In some cases, trustees have felt compelled to file premature claims, before the scope of needed restoration is even known, in order to guard against the most extreme and unfavorable interpretation of the current limitations period. When claims are filed prematurely, the NRD action becomes focused on monetized damage claims, which is inconsistent with the restoration-based approach advocated by the Administration and reflected, in several respects, in the draft title.

The draft title would revise the current statute of limitations "[w]ith respect to a facility for which the trustees and the potentially responsible parties, after the date of enactment of the [Act] have entered into a cooperative agreement governing the conduct and scope of a natural resource damage assessment and allocating the costs of the assessment." The deadline for filing such claims would be the "earlier of 6 years after the date of signing of the cooperative agreement, or 3 years after the completion of the damage assessment" (p. 241, lines 9–25).

Unfortunately, this revision to the statute of limitations does not appropriately address existing problems and could cause more. The draft title does not provide any clarification of the existing deadline. Instead, the draft provision would only apply where trustees and PRPs have entered a cooperative agreement; where there were no such agreements, the existing problematic deadline would still apply. Further, the draft provision creates a disincentive for PRPs to work cooperatively with

trustees whenever one or more PRPs might benefit from the uncertainty associated with the current statute of limitations.

As the Administration has stated in its proposal, the existing statute of limitations for non-NPL facilities should be changed to 3 years from the date of completion of an assessment in accordance with the damage assessment regulations or the completion of a restoration plan adopted after adequate public notice.

5. *Record Review*

The draft title includes provisions authorizing trustees to establish an administrative record for an assessment (p. 235, lines 6–20). However, the draft eliminates the language included in S.8 that specified that judicial review was to be based on the administrative record. The Administration supports an open assessment process in which scientific and resource management decisions are made on the basis of the best information from all interested parties, including the PRPs and the general public. By authorizing creation of a record but failing to restrict judicial review to the material in that record, the draft title provides no incentive for PRPs to provide their data to the trustees while the record is being compiled and restoration decisions are being made. In fact, the provision will likely encourage tactical withholding of information by PRPs, promotes dilatory litigation, and contravenes public right-to-know. The draft should be modified to make explicit that judicial review of assessments will be limited to the administrative record and that the court will uphold trustees' selection of a restoration action unless it was arbitrary and capricious.

6. *Limitation on Assessment Costs*

In addition, the draft title arbitrarily bars recovery of certain assessment costs. The draft title prohibits recovery of the cost of "conducting any type of study relying on the use of contingent valuation methodology" (p. 236, lines 14–17). Trustees should have the flexibility to use and recover the cost of any assessment procedure, so long as the procedure is valid and can be performed at a reasonable cost. The draft title already requires trustees to conduct assessments "in accordance with . . . scientifically valid principles" (p. 233, lines 15–18). The CERCLA natural resource damage assessment regulations contain a detailed definition of reasonable assessment costs that requires, among other things, that the cost of an assessment be less than the amount of damages being assessed (43 CFR 11. 14(ee)). The Administration believes these provisions adequately protect against unwarranted assessment costs. Furthermore, contingent valuation (CV) is a reliable and valid methodology when appropriately applied. CV has been used for years by industry for market research, and by governments for cost-benefit analyses of regulations and public works projects. CV is the only tool currently available for explicitly measuring lost nonuse values. It is also an important tool for measuring use values of natural resources.

7. *Other Concerns*

The draft title contains several other problematic provisions and fails to include several important and beneficial amendments.

A. Barring Restoration and Recovery Upon Return to Baseline.

The draft title includes a provision that would bar recovery of all restoration costs "if the natural resource returned to the baseline condition before the earlier of . . . the filing of a claim for natural resource damages; or . . . the incurrence of assessment or restoration costs by a trustee" (p. 232, lines 10–24). The Administration has actively considered such a proposal while exploring ideas that might respond to concerns raised by the committee and by industry representatives. The Administration is concerned, however, about the possibility that such a provision could unfairly eliminate all public compensation where resources recovered naturally before trustees began their assessment work, notwithstanding the fact that the public may have incurred substantial interim losses. This could be especially problematic, particularly for State and Tribal trustees, where a trustee is proceeding as expeditiously as possible to assess the effects of known hazardous substance releases, but staff and funding constraints delay assessment and restoration. It may not be appropriate for the public to bear the cost of interim loss of resources in cases where trustees are simply unable to begin assessment work for this reason. In other cases, the public may have experienced clear losses, yet trustees may have had no reason to suspect that the losses were a result of a hazardous substance release until after natural recovery occurs. This provision also might create a disincentive for PRPs to provide timely notification of releases, since by delaying or failing to provide such notification, they might avoid liability for the public's loss altogether. For these reasons, the Administration believes that this particular provision warrants further discussion and consideration by Federal trustees and by potentially affected stakeholders.

B. Modification of the “Double Recovery” Provision

The draft title modifies the bar on double recoveries by providing that any “person” that recovers “damages, response costs, assessment costs, or any other costs under this Act for the costs of restoring an injury to . . . a natural resource” shall not be entitled to recovery under any law for the same injury (p. 233, lines 4–13). Throughout our discussion with committee staffs there has been no policy reason articulated for changing the existing double recovery provision. Furthermore, as drafted, this provision could be interpreted to preclude a recovery by the United States for natural resource damages (including interim losses) if the United States has previously recovered for “any” costs of a response action that in some respect affected, but did not frilly address, a natural resource injury, such as by enhancing recovery of an injured resource. Because CERCLA defines “person” to include the United States, rather than “agencies of the United States,” a response cost claim brought by EPA could be read to bar a subsequent NRD claim brought by a trustee.

C. Encouragement of Trustee Conflicts

The draft title requires that the natural resource damage assessment regulations include procedures under which “all pending and potential trustees identify the injured natural resources within their respective trust responsibilities, and the authority under which such responsibilities are established, as soon as practicable after the date on which an assessment begins” (p. 243, lines 16–22). The Administration agrees that it is appropriate to ensure that trustees pursue claims only for those resources that fall under their trusteeship and, thus, are public resources. However, this draft provision could be interpreted as requiring not only that trustees determine which resources are public but also that they delineate the overlapping jurisdictions of all the different trustees. If all trustees are working together resolving such inter-trustee jurisdictional issues is unnecessary. On the other hand, requiring trustees, as one of the first steps in the damage assessment, to address such potentially contentious issues could create conflicts where none currently exist and undermine the goals of inter-trustee coordination.

D. Transition Rule

The draft (MU) title includes a transition rule that selects among sites for application of the bill’s provisions. The Administration has not had an opportunity to understand the particular rationale by which the committee developed this rule, but we are concerned that this transition rule may operate arbitrarily and unfairly in its selection of the sites to which the new provisions apply.

E. Omissions

There are numerous other aspects of the proposal that are of concern to the Administration. We are identifying a limited number of omissions for your consideration now, with the expectation that more technical issues can be resolved if staff negotiations resume.

- The draft title fails to authorize the recovery of enforcement costs, thus preventing the public from being made whole for the costs of the release.
- The draft title omits the clarification in the Administration’s proposal that the government may split response claims and natural resource damage claims, and that natural resource damage claims are not compulsory counterclaims to claims against the government for recovery of response costs or performance of response action.
- The draft title fails to include provisions identified in the Administration’s proposal explicitly requiring consultation with trustees before selection of a remedial action, and calling for new regulations governing coordination with trustees regarding listing of sites on the NPL, investigations of releases, and selection of response actions.
- The draft title fails to include provisions identified in the Administration’s proposal adding references to notification of tribal trustees by response agencies.

CONCLUSION

The Administration appreciates the opportunity to provide testimony on this draft proposal. In spite of the committee’s concerted effort to modify or eliminate many of the most objectionable provisions of S. 8, the Administration strongly opposes this draft title in its current form and urges the committee instead to adopt the Administration’s proposal or to incorporate more frilly the elements of that proposal in the committee’s draft. NOAA and all of the other Federal natural resource trustees stand ready to resume negotiations with the committee so that, together, we can develop a broadly supported, bipartisan proposal on NRD that can move forward in this session of Congress.

Thank you, Mr. Chairman. This concludes my statement.

PREPARED STATEMENT OF THE HONORABLE E. BENJAMIN NELSON,
GOVERNOR OF NEBRASKA

INTRODUCTION

Good morning Mr. Chairman and members of the committee. My name is E. Benjamin Nelson. I am Governor of the State of Nebraska and chair of the National Governors' Association (NGA) Committee on Natural Resources. This testimony is presented on behalf of the National Governors' Association, but has been developed in close consultation with the Environmental Council of States (ECOS) and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), which represent State officials who manage the Superfund program on a daily basis.

The States have a strong interest in Superfund reform and believe that a variety of changes are needed to improve the Superfund program's ability to clean up the nation's worst hazardous waste sites quickly and efficiently. We commend U.S. Environmental Protection Agency (EPA) Administrator Carol Browner for many of the administrative reforms she has developed for this program. However, we still believe that legislation is required. If I leave you with one message today, let it be our hope that Senators on both sides of the aisle will continue to work in a bipartisan fashion to craft a Superfund reform package that can be signed into law. The Governors are committed to doing everything within our power to assist in that effort and hope to continue working cooperatively with both the majority and the minority to develop a final bill that enjoys broad bipartisan support and can be signed by the President.

Mr. Chairman, Senator Smith, I want to commend you for developing a very good starting point for the kind of bipartisan negotiations that are required to develop a bill the President can sign. I know that there remain important differences between Republicans and Democrats and between States and the Administration, but we see the chairman's mark as a significant step toward resolving the concerns that were expressed by both EPA and the States concerning the underlying bill. Important compromises have been made in the development of this legislation, and we hope the spirit of compromise will continue on a bipartisan basis.

The States appreciate the opportunity to review and comment on the draft chairman's mark dated August 28, 1997. Today, I would like to address NGA's overall assessment of the bill and suggest a few areas where improvements could be made.

BROWNFIELDS REVITALIZATION AND VOLUNTARY CLEANUP PROGRAMS

The Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties, and we commend the committee for including brownfields language in the bill.

The Governors would like to emphasize the importance of State voluntary cleanup programs in contributing to the nation's hazardous waste cleanup goals. States are responsible for cleanup at the tens of thousands of sites that are not on the National Priorities List (NPL). In order to address these sites, many States have developed highly successful voluntary cleanup programs that have enabled sites to be remediated quickly and with minimal governmental involvement. It is important that legislation support and encourage these successful programs by providing clear incentives and flexibility. Frankly, we feel an increased need for congressional direction because the guidance on State voluntary cleanup programs that EPA is about to finalize does not afford us the necessary and appropriate flexibility. It is the view of States that voluntary cleanup programs and brownfields redevelopment are currently hindered by the pervasive fear of Federal liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980. We strongly support the provisions in the chairman's mark that encourage potentially responsible parties and prospective purchasers to voluntarily cleanup sites and reuse and redevelop contaminated property. The draft achieves this goal by precluding subsequent Federal enforcement at sites where cleanup has occurred under State programs and by providing needed liability protections for prospective purchasers and owners of property contiguous to contaminated sites. However, in the event EPA discovers an imminent and substantial threat to human health and the environment at a site, NGA does support EPA's use of its emergency removal authority. We also believe that an important provision has been included that clarifies EPA's authority to take action at a site if a State requests the President to do so. Any assignment of liability, however, must be consistent with liability assigned under State cleanup laws.

Finally, we would like to make the distinction that while the draft would preclude Federal enforcement for sites in a State voluntary cleanup program, you have not provided a release from Federal liability. We believe that this would leave potentially responsible parties vulnerable to third party suits and would effectively take much of the incentive out of entering a State voluntary cleanup program. We would like to work with the committee to address this provision.

STATE ROLE

The impacts of hazardous waste sites are felt primarily at the State and local levels, so each State should have the option to take over and administer as much of the program as they can. The Governors support the efforts of Senators Chafee and Smith to provide us with options to enhance the role of States in this program. We appreciate the inclusion of options for authorization, expedited authorization, delegation, and limited delegation by agreement in the draft and feel that this allows for maximum flexibility to meet State needs and objectives. We especially support the authorization provisions that allow States to operate their programs in lieu of the Federal program. Where a State is authorized to operate a program in lieu of the Federal program, States should receive adequate Federal financial support.

The creation of an expedited process to delist from the NPL a site for which a State has assumed responsibility will help provide a necessary finality to the Superfund process and will help prioritize time and money on remaining problems.

However, the States cannot support allowing EPA to withdraw delegation on a site-by-site basis. EPA should periodically review State performance instead of involving itself in site-by-site oversight. If program deficiencies are found, a State should have an opportunity to resolve them before EPA proceeds to withdraw authorization or delegation. Withdrawal of delegation should be consistent with the criteria for approval or rejection of a State's application for delegation.

The Governors strongly support a 10 percent State cost-share for both remedial actions and operations and maintenance and appreciate the retention of this provision in the chairman's mark. The Governors would like to ensure that the provision for States to petition the Office of Management and Budget (OMB) is a workable mechanism to deal with any cost-shifts resulting from changes in liability, and that reform does not result in a higher cost-share than States currently pay.

SELECTION OF REMEDIAL ACTIONS

Because of the complexity and importance of the title on "Selection of Remedial Actions," I would like to respectfully request more time to provide detailed comments and have them included in the record after we have had time for more adequate review. Although we will undoubtedly have some comments with this title, there are several key improvements that I would like to touch on today.

The Governors believe that changes in remedy selection should result in more cost-effective cleanups; a simpler, more streamlined process for selecting remedies; and a more results-oriented approach. We believe the bill moves significantly in this direction. Many of these reforms seem to us to be codifications and improvements of EPA's administrative reforms.

As you know, allowing State-applicable standards to apply at both NPL and State sites is of great importance to the Governors. We greatly appreciate and strongly support measures to allow State applicable standards and promulgated relevant and appropriate requirements to apply to all site cleanups. The Governors agree with the importance of considering different types of land uses when determining cleanup standards and appreciate the inclusion of provisions in the bill that provide for State and local control in making determinations of foreseeable land uses. We would like to ensure that, when appropriate, feasible, and cost-effective, the cleanup standards chosen allow for unrestricted use of the site. In addition, we would like to ensure that land-use decisions are not second-guessed by EPA.

The Governors believe groundwater is a critical resource that must be protected. The use of State applicable standards and the opportunity for State and local authorities to determine which groundwater is actually suitable for drinking are essential during the remedy selection process. While we believe that groundwater needs to be protected, we need to ensure that these provisions are workable and flexible.

The Governors recognize that there are some records of decision (RODs) that should be reopened because of cost considerations or technical impracticability. However, we have been concerned about a flood of petitions to reopen, and we believe the Governor should have the final decision on whether to approve a petition to reopen a ROD in his or her State. We particularly appreciate the efforts of the committee to improve the draft by removing the provision in S.8 that would allow

a remedy review board to override a Governor's veto of a petition to reopen a ROD. NGA believes that this is a very important addition.

We would also like to commend you on removing the provision in S.8 that would preempt State liability laws at sites where EPA has released a potentially responsible party from Federal liability because the site has been cleaned up for unrestricted use. As you know, the Governors do not support preemptions of State law and are grateful to you for incorporating our recommendations in your draft.

LIABILITY

The liability scheme employed in any hazardous waste cleanup program is critical to the success of that program. The current CERCLA liability scheme serves some purposes well. It has proved effective at encouraging better waste management, and it has provided resources for site cleanups. However, the current system has a history of leading to expensive litigation and transaction costs. Therefore, the Governors are not averse to some changes in liability, though we are concerned with the resulting effects on the States. In general, we support the elimination of *de minimis* and *de micromis* parties and believe the liability of municipalities needs to be addressed. However, we question broader releases of liability for other categories of responsible parties. In any case, we would like to see convincing analysis that any changes in the liability scheme provide adequate assurance and funding so that sites will continue to be cleaned up and so that there will be no cost shifts to the States.

Although it is clear that much effort has been focused on finding compromises and creating a more equitable system, the Governors are still concerned that the changes to the Federal liability scheme are not complementary to State liability programs. We are particularly opposed to the apparent preemption of all State liability laws when a facility has been released from Federal liability. Preemption of State liability laws at NPL sites effectively creates an inequitable situation in States because it creates an inconsistency in application of State law at sites throughout the State. We want to avoid creating a scenario where there is a demand by potentially responsible parties to be added to the NPL because the Federal liability scheme is more favorable.

As I mentioned earlier, we fully support a release of Federal liability at non-NPL sites where a release of liability has been granted under State cleanup laws protective of human health and the environment. Much emphasis has been placed on modifying the language on liability, and we do not want to discount the obvious efforts at compromise that can be seen in this draft. However, we would like more time to review the provisions of this title and would like to work with the committee to create a system that has fewer adverse impacts on State programs.

FEDERAL FACILITIES

The Governors support legislation that ensures a strong State role in the oversight of Federal facility cleanups. The double standard of separate rules applying to private citizens and the Federal Government has a detrimental effect on public confidence in government at all levels. Therefore, the Governors believe that Federal facilities should be held to the same process and standard of compliance as private parties. We would like to make sure that the intent of language in the draft allows State-applicable standards to be applied at Federal facility sites in the same manner that they apply at nonFederal facility sites.

The States would like to commend the committee for including provisions in the chairman's mark allowing EPA to transfer responsibility for Federal facilities to States. However, we are unclear why the process is different and the provisions much more restrictive than the provisions in Title II for nonFederal sites on the NPL. One interpretation is that responsibility for Federal facilities may be transferred to States, but that States must at all times use the Federal remedy selection process. We do not understand the justification behind this language and would be greatly concerned if this precludes States from applying State applicable standards to Federal facilities if they are more stringent than the Federal standards.

In addition, in virtually every other environmental statute, Congress has waived sovereign immunity and allowed States to enforce State environmental laws at Federal facilities. A clearer, more comprehensive sovereign immunity waiver should be developed that includes formerly used defense sites.

NATURAL RESOURCE DAMAGES

The current natural resource damage provisions of CERCLA allow Federal, State, and tribal natural resource trustees to require the restoration of natural resources injured, lost, or destroyed as a result of a release of a hazardous substance into the

environment. The Governors feel this is an important program that must be maintained. We commend the committee for emphasizing restoration as the primary goal of this program, extending the statute of limitations to 3 years from completion of a damage assessment, and creating an effective date to protect claims and lawsuits already filed. Protection of existing claims and lawsuits is a very important provision for all Governors, particularly Governor Marc Racicot of Montana who serves as vice chair of NGA's Committee on Natural Resources. We also suggest that the committee consider removing from the trust fund the prohibition on funding natural resource damage assessments and giving State trustees the right of first refusal to be lead decisionmaker at NPL sites with natural resource damages. We also support retention of nonuse damages.

MISCELLANEOUS

The States would like to applaud the inclusion in this draft of a provision to require the concurrence of the Governor of a State in which a site is located before a site may be added to the NPL. NGA has fought long and hard to have this vitally important provision included in legislative proposals.

We have concerns about an annual "cap" or limit on NPL listings. We believe that by requiring a Governor's concurrence on any new listings, a sufficient and appropriate limitation is placed on new listings. Further limitations are unnecessary. Because of differences in capacities among States, the complexities and costs of some cleanups, the availability of responsible parties, enforcement considerations, and other factors, limitations on new listings could result in some sites not being cleaned up. We believe there should be a continuing Federal commitment to clean up sites under such circumstances, regardless of whether an arbitrary cap has been exceeded in any given year. The States are interested in working with the committee to resolve our concern.

CONCLUSION

Mr. Chairman, I would like to thank you for your hard work on this important reform legislation and for providing me with the opportunity to communicate the views of State government on Superfund reform. Again, NGA, ECOS, and ASTSWMO are very encouraged by the direction you have taken with this legislation and are pleased that this draft reflects many important compromises that should enjoy bipartisan support. We hope that members of both parties will roll up their sleeves to pass Superfund reform legislation. I look forward to working with both the majority and minority to bridge any differences and craft legislation that can be signed into law.

RESPONSES BY GOVERNOR E. BENJAMIN NELSON TO QUESTIONS FROM SENATOR WYDEN

Question 1. Isn't it true that private parties have to comply with all applicable environmental laws, both State and Federal, when they're conducting cleanups at Superfund sites and are subject to enforcement action if they fail to comply? Is it good public policy to allow a double standard for private versus Federal cleanups when it comes to complying with these laws?

Response. It is true that private parties must comply with all applicable State and Federal laws during the course of remediation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980. The requirements of State environmental laws and Federal laws, such as the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act, are binding on remediating parties under all circumstances.

As I stated in my testimony, the Governors believe that failure to hold the Federal Government to the same standards it imposes on private parties creates a double standard and allows it to elude its civic responsibilities. This double standard erodes the public's faith in all levels of government, precludes States from consistently enforcing the environmental standards that they have adopted as protective of human health and the environment, and shifts the costs of remediating Federal sites to State governments.

The Governors strongly recommend that Congress include in CERCLA a clear requirement that Federal agencies comply with all procedural and substantive requirements of State and Federal environmental law.

Question 2. Does the National Governors' Association support adding language to Superfund reform legislation to make it clear that Federal agencies must comply

with applicable environmental laws during the course of Superfund cleanups at Federal facilities and/or clarify the authority of States to enforce these laws?

Response. The Governors recommend that Congress include a clear waiver of sovereign immunity under CERCLA as it has under virtually every other Federal environmental statute. A waiver of sovereign immunity would hold the Federal Government to the same standards it has set for private parties and allow States to enforce environmental requirements against Federal facilities in the same manner and to the same extent they are enforced against private parties.

RESPONSE BY GOVERNOR E. BENJAMIN NELSON TO A QUESTION FROM
SENATOR MOYNIHAN

Question 1. The chairman's mark asks for a cap on the number of new NPL sites. How will this cap affect the "cleanup" of sites not yet on the NPL?

Response. As I testified, NGA opposes an arbitrary limitation or "cap" on the National Priorities List (NPL) because it could preclude the Federal Government from addressing a contaminated site if the cap had been reached in a given year. The Governors recognize that sites may be discovered in the future that may require Federal attention and believe that the Federal Government should continue their commitment to cleaning up the most contaminated sites.

We believe that requiring a Governor's concurrence on all NPL listings places a reasonable and appropriate limitation on new NPL listings while ensuring that the Federal Government maintains its necessary role.

RESPONSE BY GOVERNOR E. BENJAMIN NELSON TO A QUESTION FROM
SENATOR CHAFEE

Response. Mr. Chairman, I would like to take this opportunity to respond more thoroughly to a question you asked me on September 4. You asked my opinion of a comment made by Ms. Wilma Subra, the community participation representative on my panel. She opposed a substantial State role in the Superfund program because of her lack of faith in her State government to protect the people.

I believe very strongly in the concept of federalism and the role of State governments in the lives of people every day. Governors take pride in their jobs and take environmental protection very seriously. A substantial State role in this program is entirely appropriate and necessary and all Governors take offense at Ms. Subra's assertion that people need the Federal Government to protect them from their State government. The answer to this concern should continue to be the election process, not the administrator of the U.S. Environmental Protection Agency.

The Governors commend you for including in your mark flexible opportunities for States to administer the Federal Superfund program and a provision that requires a Governor's concurrence for all new NPL listings. These provisions strike an appropriate balance between the roles of State and Federal Governments.

I again thank you for the opportunity to testify and for the chance to respond to additional questions for the record. If I, or any of the Nation's Governors, can be of any assistance as you continue to develop a bipartisan Superfund reform package, please contact me directly. I look forward to working with you on these very important issues.

PREPARED STATEMENT OF MAYOR JAMES P. PERRON, ELKHART, IN, ON BEHALF OF
THE U.S. CONFERENCE OF MAYORS

Good morning, Mr. Chairman and members of the committee. I am James Perron, Mayor of Elkhart, IN. I am pleased to be here this morning and thank you for your leadership in development of S. 8 and in moving the legislative process forward with this hearing. Today I am testifying on behalf of the United States Conference of Mayors, which represents over 1100 cities with populations of 30,000 or more.

As Mayor of Elkhart for almost 15 years, I have dealt head-on with virtually every environmental problem and opportunity available to a modern city today, including: Superfund, groundwater contamination, recycling, closing a polluted landfill, riverfront redemption and many others. Our Environmental Center—built on the site of the old city dump—and our EnviroCorps program, funded by AmeriCorps—are award winning. We have an ongoing relationship with Notre Dame University aimed at environmental management innovations. I know that working together we can bring new success to Superfund and Brownfield initiatives.

Mr. Chairman, I should note for the record that my experience with the Superfund program goes back almost to its beginning as well as the start of my mayoralty. Soon after taking office in 1984, we learned that our municipal drinking water supply was essentially a Superfund site. In the years that followed, working closely with EPA, our community worked its way out of this dilemma. Our water supply is now clean, and we have a Sole Source Aquifer Designation.

Our experience with brownfields is very real and hands-on. Elkhart is one of the most densely industrialized cities in the country. We are among the Nation's leaders in per capita manufacturing jobs. Many projects have been slowed and others even brought to a halt by problems associated with brownfields. The framework provided by S.8, along with a willingness on the part of a city to work creatively with the private sector, will go a long way toward accelerated brownfield recycling.

The Nation's mayors are uniquely interested in Superfund reform, because we have been directly affected by the best and the worst of Superfund. We believe that the Superfund program has been successful in meeting three national policy objectives: (1) the dramatic reduction in use of hazardous materials by industry and commerce, (2) the ability for our nation to respond to emergency spills and contamination that pose an immediate health and environmental threat, and (3) creation of a much safer, national hazardous waste management and disposal system.

No one doubts that industry and businesses have significantly reduced their use of hazardous substances because of the threat of CERCLA liability. When CERCLA was passed in 1980, many companies entered the hazardous materials business in expectation that the need for hazardous materials management would result in handsome profits. But many of their projections did not materialize. Instead, industry changed how it did business and used less hazardous materials.

The emergency response program within CERCLA is a similar success story. EPA has been able to immediately respond to hundreds of emergencies across the Nation that represented immediate endangerment to the public's health. The program gets high marks for its efficiency and should continue. Similarly, we are disposing today of our hazardous waste in a dramatically safer manner than we did prior to CERCLA's enactment.

That's the best of Superfund. But along side these tremendous public benefits is a horrible, unintended consequence of the Superfund program—the fact that the private sector will not invest in hundreds of thousands of non-NPL, contaminated properties because of the fear of being caught in the Superfund liability web. The liability structure of Superfund has had a chilling effect on developers and local governments who want to redevelop these so-called “brownfields”—sites that have been contaminated or “might be” contaminated because of their past industrial or commercial use.

Furthermore, the Superfund program has made the cleanup of National Priority List sites expensive, bureaucratic, time-consuming and litigious. Everyone agrees that the Superfund program as it relates to NPL sites needs reforming. Local governments, non-profits and small businesses are acutely aware of this because liability associated with the normal disposal of municipal solid waste has resulted in endless litigation. While allocating costs to the polluter of an industrial facility that has undergone few changes in ownership makes sense, sorting out through the courts who disposed of municipal solid waste over an extended period in a co-disposal site is a nightmare and has accounted for some of Superfund's most egregious horror stories. Your decision to move forward with a mark up of S.8 to reform and expedite how we deal with Superfund site cleanups is extremely important and the nation's mayors want to support your efforts. We hope that this process will coalesce in bipartisan support for a Superfund reform bill in this Congress.

BROWNFIELDS

Mr. Chairman, the contamination of now abandoned industrial and commercial property, which today we call brownfields, was not caused by local governments or the citizens who now must live with the consequences of lost jobs, an eroded tax base and abandoned or underutilized properties that denigrate communities. The unintended, negative consequence of our Federal Superfund policies has been the price for achieving the Superfund program's national benefits. This unfortunate situation simply must be addressed in an aggressive way as you begin the reauthorization process. We must undo the unintended harm that Superfund has imposed upon our communities.

Last year The U.S. Conference of Mayors released at its Winter Meeting a 39-City Survey on the Impact of Brownfields on U.S. Cities. Of the cities surveyed, 33 cities with brownfield sites said that more than \$121 million is lost each year in local tax revenues—using conservative estimates. More than \$386 million is lost

each year, using more optimistic estimates, suggesting that the more than 20,000 cities and other municipalities nationwide could be losing billions of dollars each year in local tax receipts due to the existence of brownfields. I am pleased to provide a copy of the survey to the committee for the record.

Mr. Chairman, we also believe that the existence of brownfields and the inability to "recycle" our previously contaminated land has additional negative environmental effects. Urban sprawl has a direct negative impact on air and water quality, in addition to destroying farmland, forests, and open spaces. We believe that between 1982 and 1992, prime farmland equivalent in area to the States of Rhode Island and Connecticut was lost to urban sprawl. If we do not develop an aggressive farmland and forest preservation program that allows us to turn our development energies to brownfields, this alarming trend will only continue.

The President of the U.S. Conference of Mayors, Fort Wayne Mayor Paul Helmke, has made brownfields redevelopment the top priority for the nation's mayors in the coming year, as did Mayor Richard Daley of Chicago during his presidency of the Conference. Your willingness to place brownfields as Title I of the Superfund reform bill is, itself, an indication that this committee understands the importance of addressing the Brownfields issue. As we speak, Mayor Helmke is meeting with the Co-chairs of our Brownfields Task force in Rhode Island to further evaluate S.8 and its brownfield proposals. We would be pleased to forward our more detailed comments on S.8 and the results of our deliberations to the committee in the coming days. We would also like to submit for the record the Conference of Mayors brownfields and Superfund reform policies unanimously adopted in San Francisco at our annual meeting in June of this year.

Turning specifically to the proposals that we were asked to address for today's hearing, I would like to start by saying that it is important for Title I on Brownfields to provide local governments the greatest flexibility possible in the use of brownfields site assessment, characterization, and cleanup funds.

The definition of brownfields should not require the site to currently have an "abandoned, idled, or underused facility." Many former industrial and commercial sites have been razed, but still contain contamination that should qualify the site as a brownfield.

Likewise, the list of exclusions in the definition of brownfields should be significantly narrowed or eliminated, so that local governments have the flexibility to submit brownfield sites that are local priorities. For example, the current list of exclusions within the brownfields definition would disqualify sites that should be addressed as brownfields, such as those that have been subject to emergency response actions. Many emergency response actions remove the immediate "emergency" but do not leave the property in a condition that would allow the private sector to invest in it. These abandoned industrial sites may have both removal and remediation needs which require action to address immediate threats and a less urgent remedial process to restore the property to a useful purpose. The current language would not provide the flexibility needed to include these sites as a part of a local government brownfields program, the principal purpose of which is to clean these sites and return them to tax generating properties.

Similarly, under the current language, a facility that was subject to corrective action would be disqualified as a brownfield. But the corrective action may apply only to the "waste disposal unit" on the site. In these instances, the entire site should not be disqualified from the brownfield program.

Furthermore, many sites have multiple contaminants that may be subject to various statutory authorities. Local governments need the equivalent of a "one-stop" shop at EPA where the sole objective should be to clean up the site as soon as possible and to return it to productive reuse in the community. The presence of a particular type of contaminant should not disqualify the site, particularly if the local government has determined that it is in the best interest of the community to qualify the site as a brownfield. The brownfields program offers us a unique opportunity to create that "one-stop shopping" approach.

The bottom line is that local governments want to serve as a catalyst to attract the private sector to invest in these sites. Our goal should be results oriented: clean them up and return them to productive economic reuse, as opposed to disqualifying them.

On the issue of funding, we believe that the Superfund program, which helped to create hundreds of thousands of brownfields, should devote at least 10 percent of its funding annually to the brownfield cleanup program. We are extremely pleased that both House and Senate Appropriations Committees have provided \$85 and \$88 million respectively in fiscal year 98 for the EPA brownfields program. We want to thank Senator Bond for his leadership in that arena.

We believe this funding can be justified on the grounds that the Superfund program has served as a tremendous disincentive for the cleanup and reinvestment of these properties. But it can also be justified on public health grounds. While brownfield sites may be less contaminated than NPL sites, in many instances they are more accessible to the public. An abandoned industrial facility is an invitation to the public, particularly children. Anyone who says that such facilities can be adequately secured over long periods of time in an urban or rural environment is not realistic. Furthermore, the inability to redevelop these sites has resulted in the denigration of many communities, loss of jobs and therefore a general decline in the health of a community. We believe these reasons are more than adequate to justify significant funding for brownfields cleanup and redevelopment.

We believe that the limitations on funding per site in the current draft are overly restrictive. Certain large brownfield sites may well need more assessment and cleanup funds than are allowed for in the current draft. Similarly, the limitations on the size of capitalization grants for local revolving loan funds are also overly restrictive, especially when one considers communities that have been, or are, heavily industrial, or smaller communities that may have a single, but very large brownfield site. In addition to capitalization grants, language should clarify that grant funds can also be used directly to clean up sites, particularly those sites held by local governments or those located in distressed communities.

We want to commend the committee for providing liability provisions which protect certain third party purchasers of brownfield properties. We want to make sure that local governments are afforded equal liability protections if they acquire property for brownfield redevelopment or have acquired the property as a result of tax foreclosure. It is also extremely important that the legislation include strong provisions for "finality" of sites cleaned up through State voluntary cleanup programs, with well defined, limited parameters as to when EPA may reintervene. Additional comments on these provisions, which we consider of critical importance, will be submitted for the record in the coming days.

Mr. Chairman, we consider Title I of the revised draft of S.8 to be an excellent starting point for further consideration and we look forward to working with you to further improve it.

SUPERFUND PROVISIONS

Mr. Chairman, the policy which mayors adopted in San Francisco calls for Superfund reauthorization to include provisions that expedite the cleanup of co-disposal landfill sites by providing liability protections for generators, transporters, and arrangers of municipal solid waste and capping liability for local government owners and operators of such landfills. The provisions of S.8 clearly begin that process and go a long way toward that end. We are concerned, however, that the bill does not provide generators and transporters of MSW protection from third party contribution lawsuits for cleanup costs incurred prior to date of enactment at codisposal sites. Because we believe Congress never intended municipal solid waste and sewage sludge to be considered hazardous under CERCLA, we believe that some form of liability relief should also be extended to pre-enactment costs for generators and transporter of MSW, particularly those related to third party contribution suits that have not yet been settled. Numerous studies have indicated that MSW contains less than one-half of 1 percent (.5 percent) toxic materials. In almost every instance, NPL landfill sites are co-disposal sites contaminated principally by hazardous waste, not municipal solid waste. We also encourage the committee to include local government "ability-to-pay" provisions in the bill.

Our policy also calls for the EPA to adopt administrative reforms to provide liability relief to generators, transporters, and arrangers of municipal solid waste at co-disposal sites. We are pleased that the Agency has responded with its recent proposal, which should apply to all pending third party suits. One concern, however, is how will EPA adjust the per ton fee as more cost efficient remedies are performed on co-disposal sites, and how can local governments be assured that they do not pay an unreasonable percentage of cleanup costs at co-disposal sites under this proposal. The most important principle set forth in EPA's policy is that municipal solid waste has virtually never been the cause for listing co-disposal landfills on the NPL. This principle should guide the policies for both legislative and administrative reform. Various legislative proposals in the past have relied on the principle that in no case should generators and transporters of municipal waste pay more than 10 percent of total response costs—a threshold that the EPA administrative reforms must meet in order to be viable. We are currently evaluating the EPA proposal to determine if it meets this test. However, we agree with the chairman's mark which reflects the view that the toxicity of MSW is so low that the transaction costs of collecting

funds for response costs incurred after date of enactment warrant a transfer of liability from individual parties to the orphan share.

Mr. Chairman, we look forward to working with the committee to determine if there is a way to marry the benefits of both these approaches.

On the issue of remediation, many of our public water systems want to make sure that Superfund reforms adequately protect public health and preserve our drinking water supplies for future generations. Water supplies that are or may be used as drinking water sources must be remediated, if feasible, by methods that offer permanent solutions. Remedies that serve to protect currently uncontaminated water supplies which are or may be used as drinking water sources from becoming contaminated must take precedence over other remedies. The legislation should recognize that users of the drinking water may be in separate jurisdictions and provide for involvement of both jurisdictions in remedial action plans. Mr. Chairman, I serve as the Conference of Mayors designee to the American Water Works Association Public Affairs Committee, and in that capacity I have developed an even greater appreciation for the need to protect our long term drinking water sources from further contamination.

Finally, we believe that local governments have not been adequately tapped as local management resources to help expedite the cleanup of NPL and non-NPL sites. In every aspect of the legislation, local governments should be viewed as valuable partners who are responsible for protecting human health and the environment at the local level. Therefore, we urge a stronger role for local governments in organizing the local advisory groups, in evaluating State proposals to receive delegated authority, in evaluating remedy selections, particularly as they pertain to long-term drinking water supplies, and in serving as catalysts for expediting cleanups.

Mr. Chairman, we thank you for the opportunity to appear today before the committee. We will be submitting additional comments on other aspects of the bill which we did not have time to address today. We encourage the Senate to move forward on Superfund reform and to reach a bi-partisan agreement on a bill. We believe S.8 is a good starting point for those deliberations. I would be pleased to answer any questions the committee may have.

RESPONSES BY MAYOR JAMES P. PERRON TO QUESTIONS FROM SENATOR INHOFE

Question 1. Will restrictions on new emissions restrict redevelopment opportunities in urban areas?

Response. Without question, EPA's proposed implementation plan for the new air quality standards will restrict redevelopment opportunities in urban areas. The plan perpetuates the flawed regulatory approach that now targets urban "nonattainment" areas, imposing pollution control costs on businesses located in those areas. These costs can be, and are, avoided by locating outside of the nonattainment areas where increased pollution is allowed due to less stringent regulations.

We know that redevelopment efforts in many urban areas are already hampered by the existing air regulations and implementation plan. EPA itself has admitted that the existing framework effectively drives businesses away from urban areas. The new implementation plan could serve to exacerbate this problem, not only because it retains most elements of the existing implementation plan, but also because it threatens to impose even more restrictions on many urban areas and is fraught with regulatory uncertainty.

The existing implementation plan for the former 1-hour ozone standard already hinders redevelopment efforts in many urban areas, with many of the largest urban areas in the Nation already classified as "nonattainment" for ozone. Under the current legislative and regulatory framework, industrial and commercial businesses located in "nonattainment" areas are forced to comply with a number of stringent regulations that do not apply to "attainment" areas. Among other requirements, businesses that want to construct a new facility or expand an existing facility in a non-attainment area confront the following: a lengthy, complicated permitting process; an offset requirement, which means that a new emitting facility cannot be built unless an existing facility decreases its emissions or ceases its operations; and an obligation to comply with the "lowest achievable emission rate," or LAER, which requires use of the most stringent emission control technology available.

We have seen how this scheme effectively drives businesses out of major urban areas. Businesses that either cannot, or choose not to, comply with the stringent air regulations in nonattainment areas can easily avoid them simply by locating their facility in an attainment area, on a greenfield site. EPA has even admitted that this policy negatively impacts economic development in cities.

Former EPA Assistant Administrator for Air and Radiation Mary Nichols acknowledged these concerns in a July 24 interview with BNA. In discussing how air standards designate areas in or out of attainment, she said that creating these two categories “has had the unintended consequence of creating incentives for new businesses and new developments to spread out into the countryside, as opposed to helping build the economies of our core cities.” Nichols then explained that “I don’t think it’s so much that urban areas have been neglected per se. It’s that we have not given as much time and attention to helping figure out how air quality goals can meld into other goals that we have.”

EPA’s present denial of the link between air quality regulations and brownfields redevelopment efforts simply ignores its recognition of the unintended consequences brought by its regulation.

EPA’s proposed implementation plan for the new air quality standards will perpetuate and magnify the burdens on urban areas, further undermining brownfields redevelopment efforts. For the new ozone standard, EPA is proposing an implementation plan that designates geographic areas as either “nonattainment,” “transitional” or “attainment.” The “nonattainment” designation and the current implementation plan would continue to apply to all areas still designated “nonattainment” for the prior ozone standard. The stringent regulations discussed above, which clearly are in direct conflict with brownfields redevelopment efforts, would remain in place. Once these areas meet the prior standard, the new ozone standard would take effect. At that time, EPA has said that even more local controls will need to be implemented, serving to even further discourage urban redevelopment in those areas.

The “transitional” designation will further thwart urban redevelopment efforts because it will discourage businesses from redeveloping in even more urban areas than the number of urban areas now where redevelopment is already discouraged. As we understand EPA’s plan, the new “transitional” designation, which will apply to all areas meeting the prior standard but not the new standard, will likely attach to the remaining urban areas not already designated “nonattainment.” Interestingly, EPA created the “transitional” category to avoid having to impose “burdensome local planning requirements” and “stigmatize areas by labeling them “nonattainment.” This is yet another acknowledgement that its current air regulations discourage businesses from locating in urban areas.

But even the “transitional” designation will serve to discourage brownfields redevelopment. According to EPA’s proposed plan, the transitional areas may or may not need new local controls. Faced with such regulatory uncertainty, businesses looking to make sound economic investments will certainly try to avoid transitional areas in favor of attainment areas where regulations are guaranteed to be far more lax.

The proposed implementation plan for new particulate matter standard will also discourage urban redevelopment efforts, in that it creates uncertainty for at least the next 5 years. Businesses will not want to locate in an area that has the potential to be designated nonattainment.

In summary, we disagree with EPA’s representation that brownfields redevelopment efforts will not be jeopardized by the new air quality standards. Urban redevelopment is already hindered by the current standards, and will be further hindered under the new standards. EPA’s approach to clean air clearly undermines efforts to redevelop our urban environments, and is wholly inconsistent with the many brownfields initiatives being pursued throughout the country.

Question 2. Would a successful brownfields program require special flexibility from the new NAAQS standards? Other environmental standards?

Response. While a brownfields program with special flexibility from the new NAAQS would be helpful in resolving the inconsistency between the air regulations and the goal of brownfield programs, a far better solution would be to correct the problem via the implementation plan for the air quality standards. As The U.S. Conference of Mayors has pointed out in numerous other forums, the current and proposed implementation plans not only thwart urban redevelopment efforts but have numerous other problems as well, including unintended, negative consequences for both public health and the environment. A revised implementation plan—one that treats all communities equally for purposes of regulating air quality rather than singling out individual cities for disproportionate or stigmatizing treatment—would resolve the conflict with brownfields redevelopment programs and many of these other public health and environmental problems.

If revising the implementation plan for the air quality standards will take excessive time to accomplish, then the Conference of Mayors believes that an interim, flexible approach is needed to relieve urban areas attempting to redevelop brownfields of the undermining effects of the air regulations. One suggestion that

the Conference is currently developing would be to award emission credits for businesses that choose to develop at a brownfield site. The emission credits would be justified due to the fact that employees traveling to a worksite in the inner-city, as opposed to outlying areas, can generally get there by relying on public transit or making shorter auto trips. There are other benefits that can be realized when we develop these sites where densities offer many environmental and other advantages.

In answer to the question of whether a successful brownfields program would require special flexibility from other environmental standards, the Conference would be interested in seeing increased Federal funding for the cleanup of brownfields, and Federal support and recognition of State voluntary clean-up programs to encourage cleanup and redevelopment.

PREPARED STATEMENT OF WILMA SUBRA

Thank you for the opportunity to testify on the issue of Superfund reauthorization. I have been involved in Superfund issues since the inception of Superfund, working with citizens groups living around sites, serving as a technical advisor on the National Commission on Superfund, and provide technical assistance to citizens groups at 8 Superfund Sites through the TAG process.

STATE DELEGATION

The transfer of authority to States in order to perform the Superfund program may be appropriate for a few States, but the wholesale transfer of the Superfund program to a large number of States will have a negative impact on the program.

An example of a State that should not be granted Superfund authority is the State of Louisiana. The State lacks the financial resources, personnel and political will to even implement their own State program. The majority of the National Priority List sites in Louisiana were submitted to EPA by citizens groups. The State did not want the stigma of hazardous waste sites being on a Federal list.

In 1995, the State legislature removed almost all of the funding and personnel from the State program. The current State program only has sufficient financial resources to perform small emergency removal actions when midnight dumpers drop off barrels of waste along roadsides and to provide Federal required oversight at the 14 Superfund Sites in the State. There is little or no resources to evaluate the more than 500 potential sites or to perform remedial activities at confirmed sites. During the past two fiscal years 57 confirmed hazardous waste sites sit waiting for cleanup when and if resources become available. When sites pose an eminent and substantial threat, the EPA has to step in to finance and perform emergency removal actions for the State. The most recent examples of the need for Federal resources and manpower was the Broussard Chemical Co. sites in Vermilion Parish. The EPA spent more than \$2.5 million performing an investigation, removal and disposal action at 6 separate locations operated by Broussard Chemical. A number of additional sites operated by the same person are currently being investigated by EPA.

If it were not for the EPA and the financial resources of the Potentially Responsible Parties, little progress would be made in the State of Louisiana in addressing the hazardous waste sites.

The EPA is currently funding site inspections at 15 potential hazardous waste sites in the the State of Louisiana. More than 40 pipeline companies are performing site evaluation at sites along their pipelines throughout the State of Louisiana. Site cleanups were completed at 7 PRP funded sites. The EPA is funding a program to assist the State in identifying up to 25 additional sites per year. But the State will still lack the financial resources to address the newly identified sites.

At PRP funded sites the State is still responsible for oversight. The lack of personnel resources has a major impact on the process. In Louisiana, the lack of sufficient technical resources has resulted in the State missing critical technical issues on the Shell—Bayou Trepagnier site. One of the issues missed involved the diluting of the contaminant levels by the PRP including the control samples in both the site samples and the control samples. Thus lower contaminant concentrations were evaluated for the site.

The State of Louisiana and many other States which lack financial and personnel resources should not be even given the opportunity to request State delegation or feel pushed by Congress into having to accept the delegation of the Superfund Program.

FAILURE TO ACT

The delegation of the Superfund Program to individual States contains a clause entitled Failure to Act. This clause is contained in three separate portions of the delegation requirements (pg. 37, 45 and 46). Under the Failure to Act clause, if a determination is not made by the Administration within a specified number of days after the required information is received from a State, the transfer of responsibility shall be deemed to have been granted.

This clause is inappropriate. A State should not be automatically granted delegation of the Superfund Program. The EPA must be given the opportunity to completely evaluate information provided by the State.

TREATMENT OF HOT SPOTS

The preference for permanence in Superfund remedies has been modified to only treatment of hot spots. Attempts are made to justify the appropriateness of only treating the hot spots by including containment for the other hazardous substances. Reliance on containment is not a permanent remedy and merely puts off addressing the hazardous contamination until a future date. During that period when the containment fails, public health and the environment will be impacted. The community members in the area of the site will once again be exposed to the hazardous substances and bear the burden of health impacts. The preference for permanence should be expanded to include a larger portion of the hazardous contaminants than just the hot spots.

A containment remedy is being proposed for the Agriculture Street Landfill Superfund Site in New Orleans. The landfill was operated by the city of New Orleans from 1909 to 1965. The city then developed 47 acres of the 95 acre site on top of the landfill an private and public housing, recreation facilities and an elementary school. The residential population consists of 67 privately owned homes, 179 rent-to-own townhouses, and 128 senior citizen apartments. The proposed containment will be a permeable two feet of soil in the residential area and one foot of soil in the undeveloped area. The hazardous waste will still be located one to two feet under the residential area with only a permeable layer separating the people from the waste. Even representatives of waste disposal companies have stated that no one should be made to live on top of an old landfill. In this case the people should be relocated and an appropriate containment remedy implemented.

COMMUNITY ADVISORY GROUP COMPOSITION

The composition of the Community Advisory Group is defined under SCAA Section 303(h)(5)(ii). The first type of group defined is "Person who resides or owns residential property near the facility." In the case of some Superfund sites, people live and own land on the Superfund site. These people should be represented on the Community Advisory Group.

An example of such a site is the Agriculture Street Landfill Superfund Site in New Orleans. Approximately 1,000 people live on top of the landfill and 67 families own their own homes on top of the landfill.

DELISTING

Under Section 135(a)(i), the bill proposes a delisting process that will be initiated no later than 180 days after the completion of physical construction to implement the remedy. The initiation of the delisting process after construction completion rather than after remedy implementation completion is totally inappropriate.

Under the most ideal circumstances, implementation of the remedy after construction has been completed encounters snags that were unknown during the planning process. In some cases these problems have required a change in part of the remedy process and required additional construction activities.

Just a few months ago, the solidification and stabilization portion of the remedy at the Gulf Coast Vacuum Superfund site had to be reevaluated. The waste at the site is biotreated in land treatment units and was to be solidified and stabilized with portland cement. Bench scale tests provided appropriate results. However, when the first field test was executed, the stabilized mixture failed to meet the appropriate standards due to chromium contaminants contained in the portland cement. A search for noncontaminated cement was unsuccessful. The remedy is now being reevaluated utilizing different stabilizing chemicals.

If the delisting process proposed in the bill was in place, this site would have already been delisted. Therefore I would request that the delisting process only occur after the remedy has been implemented and completed.

In the case of delisting a site, the Technical Assistance Grants could be lost due to site delisting. If delisting occurs after construction completion but before the remedy has been implemented and completed the community will be cut out of participation in the critical implementation phase of the process. There is a misconception that once the remedy is selected and construction completed, there is no need for public participation. At all of the Superfund Sites that I have been involved in, there are always situations that arise during remedy implementation that require involvement of the public in resolving the issues to everyone's satisfaction. Please do not initiate a process that prevents public involvement and participation in the remedy implementation phase of the Superfund Process.

STATE CONCURRENCE

The addition of sites to the National Priorities List can only be accomplished "with the concurrence of the Governor of the State" in which the site is located (SCAA Section 802(i)(3)). In the State of Louisiana the Governor has only concurred on one site. That site was the Southern Shipbuilding Site in Slidell. The Southern Shipbuilding site waste was to be treated in the existing Bayou Bonfouca Superfund onsite incinerator and the same contractors were to perform the work. Thus the Governor concurrence allowed the local contractors to perform the second Superfund job.

At the other sites investigated and proposed for inclusion on the NPL, the Governor did not concur. The failure to concur stopped the Superfund process and put on additional financial burdens on the already overburdened State agency. Even though the majority of the non-concurrence sites would have been PRP funded, the State agency is still responsible for providing financial and technical resources to perform oversight activities. The non-concurrent sites have had little or no progress since the non-concurrence.

The ability of the Governor to have the veto over a site being listed on the NPL is inappropriate. It not only puts an additional burden on the State agency if anything is to be accomplished at the site, it also prolongs the exposure of the citizens living and working on or near the site, or consuming seafood and animals contaminated by the site, as is the case of Bayou D'Inde in Calcasieu Parish, Louisiana.

LIMITATION ON NEW SITES

The proposed bill establishes a limit on the number of new sites that can be added to the NPL (SCAA Section 802(i)(1)). The number of sites decreases from 30 in 1997 down to 10 in the year 2000 and each year thereafter.

For States without sufficient funding to address sites that should be funded, this limit on the number of new sites will be an additional burden. In reality the additional burden will be borne by the citizens living on and adjacent to these sites. The establishment of a limit on the number of new sites should be removed from the bill.

Thank you for the opportunity to provide input into this process.

PREPARED STATEMENT OF GORDON J. JOHNSON, NEW YORK STATE ASSISTANT ATTORNEY GENERAL

My name is Gordon J. Johnson, and I am the Deputy Bureau Chief of the Environmental Protection Bureau in the Office of New York Attorney General Dennis C. Vacco. I very much appreciate the opportunity to appear before the committee, and particular thank Senators Chafee and Baucus, as well as Senator Moynihan from New York State, for giving me the time to present comments on S.8 and the chairman's draft mark of August 28, 1997.

I am appearing today on behalf of my office, which has had considerable experience in natural resource damage cases, and on behalf of the National Association of Attorneys General, NAAG. My office has handled or is now counsel in more than 25 major natural resource damages cases arising from the release of hazardous substances or petroleum products. We also challenged on behalf of the State of New York the initial natural resource damage assessment regulations promulgated by the Department of the Interior in 1986, a case which I argued before the United States Court of Appeals for the District of Columbia Circuit. That case, *Ohio v. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989), led to significant changes in the assessment regulations. When the revised regulations were challenged, New York with other states intervened in support of the rules. The decision in that case, *Kennecott Utah Copper Corp. v. Department of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996), upheld the Department's rule in large part.

At its Summer meeting on June 22–26, 1997, the sole resolution adopted by NAAG addressed Superfund Reauthorization; a copy of the resolution is attached. Attorney General Vacco was among the group of bipartisan sponsors of the NAAG resolution. The resolution directly addresses the natural resource issues which are the subject of this panel.

The NAAG resolution arose from the state Attorneys General's recognition of the critical importance of the Superfund programs in assuring protection of public health and the environment from releases of hazardous substances at thousands of sites across the country. They also know first hand the problems with the statutory scheme, and the need to limit transaction costs and streamline certain processes required by Superfund today. In particular, the Attorneys General want to make the tasks of assessing natural resource damages and restoring injured or destroyed resources less complicated, and to reduce the amount of litigation that may result when trying to accomplish those goals.

In the following paragraphs, I will first address the issues raised in the NAAG resolution, and then address other significant issues in the current bill and the chairman's draft of August 28, 1997.

1. JUDICIAL REVIEW

In the resolution, NAAG urges Congress to clarify that in any legal proceeding the restoration decisions of a trustee should be reviewed on the administrative record, and be upheld unless arbitrary and capricious. S. 8, as introduced, contained provisions in § 702 regarding the administrative record and public participation which, when read together, appeared to accomplish that goal. The chairman's mark-up retained the provision regarding the establishment of the administrative record but removed the language in the public participation section providing that judicial review of the trustee's restoration plan decisions would be on that record. S. 8 also removed the rebuttable presumption provided in current law to a trustee who adheres to the assessment regulations when conducting an assessment.

The deletion of the judicial review provision is unfortunate and unwise, and likely will lead to greater litigation, increased expense, and secretive and duplicative assessments. Unless the selection of a plan and the assessment which led to that selection is entitled to the usual administrative presumption of correctness, no trustee could afford to conduct an assessment and select a plan on an open record with full public input knowing that responsible parties would not bound in any fashion by the determination. The key to reducing the costs of assessment and constructing a cooperative relationship with responsible parties is judicial review limited to correction of arbitrary decisions by a trustee. Such a process has been at the center of administrative law processes, and has received the approval of all courts as to its constitutionality. We again urge the committee to restore the judicial review provision deleted in the recent draft.

We suggest language that makes clear the standard of review, thereby limiting the ability of the ever inventive CERCLA lawyers to raise a new issue with which to clog the courts and delay the implementation of restoration plans:

[add to end of paragraph of draft chairman's mark—August 28, 1997 in Administrative Record (new § 107(f)(20)(C)(v)(D)] In any judicial action under this chapter, judicial review of any issues concerning the selection of a restoration plan shall be limited to the administrative record, and a trustee's selection shall be upheld unless the objecting party can demonstrate, on the administrative record, that the selection is arbitrary and capricious or otherwise not in accordance with law. In reviewing any procedural errors, the court may disallow damages only if the errors were so serious and related to matters of such central relevance to the plan that the plan would have been significantly changed had such errors not been made.

2. STATUTE OF LIMITATIONS

The Attorneys General ask that CERCLA be amended to provide that claims for natural resource damages be brought within three years of the completion of a damage assessment. Currently, CERCLA has a complicated two-prong statute of limitations period. The "discovery prong" requires filing a suit within three years of the discovery of the loss and its connection with the release in question, and the "regulatory prong" requires its filing within three years of promulgation of natural resource damage assessment regulations. Final promulgation of regulations that comply with the statutory directives still is not complete.

The language of both prongs is ambiguous, and provides little guidance. What constitutes "discovery of the loss" and "its connection with the release" is far from obvious, and certainly has various interpretation in any given situation. Even the

“regulatory prong” has had numerous judicial interpretations. *See, Kennecott Utah Copper Corp. v. Dept. of the Interior*, 88 F.3d 1191, 1209–13 (D.C. Cir. 1996); *United States v. Montrose Chemical Corp.*, 883 F. Supp. 1496 (E.D. Cal. 1995), *rev. sub nom. California v. Montrose Chemical Corp.*, 104 F.3d 1507 (9th Cir. 1986); *Idaho v. M.A. Hanna Co.*, No. 83–4179, slip op. at 8–9 (D. Idaho July 17, 1995).

These provisions often put a trustee in a difficult position and result in unnecessary litigation: the trustee may have to bring suit before he or she has sufficient information to determine the scope of the injury or to quantify damages, and even before the RI/FS is completed.

In contrast, in the Oil Pollution Act of 1990, Congress adopted a clear rule: the limitations period runs three years after completion of an assessment. *See*, OPA § 1017(f)(1)(B). This period has not resulted in uncertainty for trustees or liable parties. In addressing response costs for oil spills, states and the Federal Government generally have addressed natural resource damages and either settled or dropped claims, or established timetables for an assessment. Trustees cannot afford to delay assessments and thereby extend the liability period because evidence and data needed to conduct an assessment disappears after time. As demonstrated under OPA, NAAG’s proposed solution has proved workable and just.

The August 28, 1997 draft complicates the issue further. The pertinent provision, new § 705, would apply a third period when trustees and responsible parties enter into an agreement regarding the performance of an assessment. By setting a limit of six years from the signing of the agreement, the provision may well force a trustee to court before the assessment is complete in complicated cases, and limits the flexibility parties need when negotiating an agreement. Indeed, this new provision may well discourage agreements and settlements because responsible parties might prefer to rely on the current ambiguous provisions that still would remain and avoid the certain extension this new provision provides. We suggest the follow language instead:

STATUTE OF LIMITATIONS.—(1) Section 113(g)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9613(g)(1)) is amended by striking the first sentence and inserting the following:

“(1) ACTION FOR NATURAL RESOURCES DAMAGES.—Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 106(6)) under this Act, unless that action is commenced within 3 years after the date of completion of the natural resources damage assessment in accordance with the regulations promulgated under section 301(c) of this title, or, if the trustee elects not to follow those regulations, of a plan for the restoration, replacement, or acquisition of the equivalent of the injured, lost, or destroyed natural resources adopted after adequate public notice, opportunity for comment, and consideration of all public comments.”

(2) Section 112(d) of CERCLA is amended by striking paragraph (2) and inserting the following:

(2) CLAIMS FOR RECOVERY OF DAMAGES.—No claim may be presented under this section for recovery of the damages referred to in section 107(a) unless the claim is presented within 3 years after the date of completion of the natural resources damage assessment in accordance with the regulations promulgated under section 301(c) of this title or if the trustee elects not to follow those regulations, of a plan for the restoration, replacement, or acquisition of the equivalent of the injured, lost, or destroyed natural resources adopted after adequate public notice, opportunity for comment, and consideration of all public comments.”

3. SUPERFUND MONEYS FOR ASSESSMENTS

When CERCLA was amended in 1986, Congress provided in CERCLA that the Superfund Trust Fund could be used by state and Federal trustees to conduct damage assessments, recognizing in particular that many state trustees lack the funds to pay for the necessary expertise to conduct assessment themselves. In conference, language was added to the amendments to the Internal Revenue Code which had the practical effect of negating that CERCLA provisions. NAAG long has asked that the conflict between the IRS Code and CERCLA be eliminated and that state trustees be able to draw on the Fund to conduct assessments, as they can currently to conduct RI/FS’s.

4. USE OF RELIABLE ASSESSMENT METHODOLOGIES

Just as Congress does not direct EPA to use only certain scientific methodologies in the changing and developing area of remedial science, NAAG believes that Congress should retain the ability of trustees to recover damages based on any reliable assessment methodology. S.8, however, provides that assessments must be conducted only in accordance with regulations not yet promulgated by the President, and effectively forbids the use of one methodology, the admittedly controversial "contingent valuation" methodology, in the assessment process. We believe that state trustees should not be compelled to use one federally dictated method to assess damages, particularly given the myriad types of hazardous substances and release scenarios and the experience of state trustees in assessing damages in ways that are reliable and cost-effective. The precise methodologies allowed is a matter of scientific expertise best left to the regulatory and judicial process for resolution.

5. LIABILITY CAP

We are pleased that S.8 does not alter the current liability cap. We are confident that trustees will continue to use their good sense, and in any event that the courts will not award excessive damages. Calamities such as the Exxon Valdez spill and the contamination of the Hudson River convince us that there may be circumstances where altering the current liability cap may result in a gross injustice to the people of the United States.

6. RECOVERY OF ENFORCEMENT AND OVERSIGHT COSTS

S.8 provides that trustees may recover the costs of their assessments, but is silent with respect to the related costs of enforcement and recovering the damages and a trustee's cost of overseeing restoration of damaged resources. The NAAG resolution asks that Congress clarify that such costs are inherent in a sound assessment process, and explicitly provide that trustees can recover both the costs of enforcement, including attorney fees generally incurred by a state Attorney General's office, and the costs of overseeing the implementation of a natural resource damage restoration.

The NAAG resolution is consistent with the general and uncontroversial policy that persons responsible for the release of hazardous substances have an obligation to make the public whole in the event that there is an injury to our natural resources. Well over a hundred years ago in cases on the abatement of nuisances and the public trust doctrine, the courts made clear several bedrock principles. The states and the Federal Governments are trustees for the people, and that their trust corpus includes this nation's glorious natural resources. We, as trustees, have an obligation to protect these often irreplaceable resources from harm, and those that harm them have the obligation to restore them for all the people. A strong and clear natural resource damages remedy is essential to accomplishing these goals.

Implementation of CERCLA's natural resource damage provisions had a difficult birth and early childhood. The initial assessment regulations were deeply flawed, and states such as mine had to go to court to seek their repromulgation. Contrary to Congress's directive, the Federal agencies entrusted with implementation of the Superfund natural resource damages program gave them little attention at first. Since the 1989 decision in the *Ohio v. Department of the Interior* case, however, the Federal program has matured. States have continued their progress in implementing fair and just recovery programs at state levels, relying in large part with the tools provided by CERCLA. We recognize that like almost any tool, the natural resource damage provisions of CERCLA could use some sharpening. We ask that this committee and Congress maintain the central provisions of CERCLA that make the public whole when a release causes injury.

Other Issues

S.8 and the August 28, 1997 draft address a number of natural resource damage issues important to the remedy provided by CERCLA. In the following paragraphs, I address some of the major issues, relying on the experiences of my office and those of other Attorneys General, as well as the experiences of trustees since the early 1980's with the natural resource damage provisions.

I note that the August 28, 1997 draft suggests some revisions to S.8 that address certain problems state trustees and my office found in the bill as introduced. I comment on those revisions first.

A. Consistency Requirement

The August 28, 1997 draft rewrote the consistency provision of S.8 at §703, removing troublesome language and creating in its place a provision requiring a trustee to "take into account" implemented or planned removal and remedial actions

when selecting a restoration alternative. The trustee also is required to advise EPA of the selection, confirm that the selected plan is, "to the extent practicable, consistent with the response action planned or accomplished at the facility," and to explain any significant inconsistencies.

The proposal provides a workable solution to the hypothetical problems that might arise between EPA cleanup measures and trustee restoration plans. New York would suggest one minor alteration: in cases where EPA has not implemented or planned any removal or remedial action and the site is not on the NPL, notice need not be given EPA of the selected plan. While in most significant cases a state normally will include EPA in the process at least on an informational basis, requiring the statement adds just another layer of paper and imposes another mandate on state trustees in cases where EPA has had no involvement and plans no future involvement.

B. Payment Period

S. 8 provided that payment of damage over a period of years would be appropriate. While periodic payment settlements are far from uncommon in this area, S. 8 included the "period of time over which the damages occurred" among the factors to be considered when establishing a schedule for payment. The August 28, 1997 draft wisely removed that consideration. With that and the other changes, the provision is appropriate.

C. Lead Federal Trustee

The August 28, 1997 draft modifies the provision regarding the appointment of a lead Federal trustee appropriately. S. 8 at § 702(a). The revised provision requires regulations to provide for a "lead Federal administrative trustee" at a facility undergoing an assessment, who presumably will coordinate the Federal trustees' activities administratively. This role is important, because it will give state trustees the ability to contact one Federal official when seeking to coordinate state efforts with Federal activities.

We think that the committee should clarify either in the bill expressly or through the committee's report that the "lead Federal administrative trustee" would be the lead only among the Federal trustees, not among the Federal, state and tribal trustees. At many sites, it is much more appropriate and effective for a lead trustee who handles matters with the responsible parties or among all the trustees to be a state or tribal trustee. Who should be the lead among all trustees should be left to the trustees to decide, and co-lead trustees should be allowed.

Finally, we do not think it is appropriate for the lead Federal trustee to be a responsible party, a situation which may occur in cases addressing damages arising from releases at a Department of Energy or military facility. In those situations, the lead Federal administrative trustee should be from one of the Federal agencies not liable for damages in order to eliminate even the appearance to the public and the states that the fox is deciding on repairs to the chicken house.

D. Interim Losses and "Temporary Restorations"

By arguably limiting a trustee's ability to recover interim damages to natural resources, the provisions of S. 8, even as modified by the August 28, 1997 draft, significantly depart from the principle that when natural resource are damaged, the party responsible for that damage has an obligation to make our citizens whole. While S. 8 places emphasis, appropriately, on restoration or replacement of injured or damaged resources, arguable restrictions on recovery of interim losses may also have the ironic effect of delaying that restoration. Moreover, in cases where the injury to the resources cannot be repaired except by natural recovery because restoration is infeasible or grossly expensive, the language of the August 28, 1997 draft could be read to imply that a trustee cannot recover any damages whatsoever, leaving the public alone to bear the consequences and costs of injured or destroyed natural resources.

Restoration of injured natural resources, or their replacement or acquisition of their equivalent when restoration is not feasible or appropriate, has always been the goal of a trustee. Natural resources almost always provide numerous ecological and human services and have intrinsic values to society that are difficult to quantify, and thus the first step in insuring proper compensation is to restore the resource. Pending that restoration, however, our citizens do suffer losses which also should be compensated. The August 28, 1997 draft's explicit inclusion of language allowing recovery for "temporary replacement of the lost services" is a step in the right direction, but is too limited.

First, while the draft provides that a restoration alternative selected by a trustee may include such temporary replacement, it should clarify that a trustee may begin providing such services before the restoration plan is selected at the end of an often

lengthy assessment study, and that the costs of such pre-selection provision of services will be recoverable.

Second, even if a resource recovers naturally quickly following a release, the public still has suffered quantifiable and compensable damages. For instance, when public recreational facilities, such as beaches, are closed for days after a spill, temporary replacement often will not be practicable or implementable on a short-term basis even though the public has suffered an injury. Trustees still should be able to recover damages and use sums to improve beach access or otherwise enhance the resource.

Third, the bill should be clarified to confirm that temporary replacement is allowed in non-restoration alternatives. A trustee may also evaluate “replacement” and “acquisition” alternatives when evaluating plans. Pending implementation of such plans if selected, a trustee also should be able to recover for providing replacement services.

E. Double Recovery Language

CERCLA presently contains a clause expressly prohibiting double recovery: “[t]here shall be no double recovery under this chapter for natural resources damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource.” CERCLA § 107(f)(1). While double recovery has not been an issue in the years since 1980, S. 8 rewrites the otherwise clear language. Unfortunately, the new version may create fertile ground for litigation. A strained reading of the new language may suggest that anyone who has recovered response costs which are used to restore an injured resource—and remedial work often has that consequence, obviously—cannot recover natural resource damages. Moreover, the new language appears to preempt state laws, and could result in significant unfairness. For instance, most states have long allow recovery for spills which kill fish in a river, with recoveries paid to a state’s fish stocking programs. Such damages may not necessarily be recoverable under S. 8. Thus, this new language would appear to prevent a state from recovering such damages in the event of a natural resource recovery under CERCLA as amended by S. 8. Moreover, recovery by a state for just this element of typical damages may preclude any recovery under S. 8 for all the other effects of a release.

Double recovery has not been raised as a problem, and the current language protects against such a result. We urge the committee to return to the current statutory language.

F. Injury Before 1980

Section 701(7) of the August 28, 1997 draft imposes significant and unwarranted restrictions on recovery of damages when a release occurred prior to 1980 even though damages resulting from that release still are being incurred. First, under current law, a trustee can recover if the *damages* caused by a pre-1980 release continue after 1980. *See* CERCLA § 107(f)(1) [last sentence]. Under S. 8, a trustee may recover only if the *injury* continues. This one word substitution may be read to preclude recovery of all damages whatsoever for a pre-1980 release, even one which continues to have significant impacts and harms, because some courts have concluded that the “injury” occurs at the moment of release while damages occur thereafter. *See, e.g., In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 681–687 (D. Mass. 1989). Claims now being litigated for numerous sites could well be affected and extinguished.

At common law, the creator of a nuisance which continues to cause damage after its creation still is liable for its abatement. This well-grounded common law doctrine is at the heart of the natural resource damages remedy, and should not be discarded by this committee.

G. Apparent Ban on Modeling

Modeling of releases and spills to calculate damage quickly and inexpensively is not only permitted by current law, but expressly encouraged. *See*, CERCLA § 301(c)(2). Especially when damages resulting from a spill are not extensive, modeling avoids the costs associated with damage assessment and the necessary scientific procedures and analyses that otherwise might be required to complete a site-specific assessment.

In contrast, S. 8 provides that all aspects of the assessment process shall, “to the extent practicable, be based on facility-specific information.” S. 8 at § 703(a). This provision could be read as essentially prohibiting modeling despite the huge savings in assessment costs resulting from its use. We believe that the provision is counterproductive and may well increase assessment costs—which would be paid by liable parties—to many times more than any miscalculation modeling of restoration costs might yield at a specific site. We urge this committee to allow modeling and other

types of expedited assessments as possible methodologies that could be considered when promulgating assessment regulations.

H. Identification of Trustee Responsibilities

S. 8 requires the assessment regulations include procedures for trustees to identify the resources under their trusteeship and the legal bases for their authority. These procedures are not useful, and could create issues for time-consuming litigation as well as foster jurisdictional disputes among state, Federal and tribal trustees. In New York, we have repeatedly worked with other trustees from the Federal Government, tribes and other states. Cooperation is fostered when we agree to avoid debates over the status and nature of our trusteeships, and has allowed us to work more cooperatively and efficiently with responsible parties. This provision of S. 8 is unnecessary.

I. Timeliness of Suit

The August 28, 1987 draft adds a paragraph prohibiting recovery by a trustee if the resource has returned to baseline condition before the trustee files a claim or incurs assessment or restoration costs. This provision would unfairly penalize the public and award polluters when a trustee lacks the finances or opportunity to address immediately a particular release even though the public has suffered considerable injury until the resource recovered.

For instance, a release may close recreational facilities or kill fish, but before a trustee can turn his or her attention to the matter, the resource may have returned to baseline conditions. As discussed above, such events do cause damage which should be compensable. More ominous, however, is the inducement created by this section for a responsible party to withhold crucial information about a spill and its effects from the trustee and the public until the resource has naturally recovered. We urge that this provision be deleted from the bill.

J. Non-use Values

S. 8 expressly prohibits recovery for "any impairment" of non-use, or passive use values. In New York, we believe that such a provision could inappropriately devalue natural resources, and may force the State and its taxpayers to bear themselves the costs arising from improper release of hazardous substances.

The value of a natural resource is a combination of its value as a useful commodity, such as the value of an aquifer as drinking water or seal pelts as clothing, and its passive values. These passive values include the value placed on having a resource available for future use, and the fact that we repeatedly pay to have resources available merely because we value their existence. My state expends thousands of dollars a year to protect and propagate endangered species, even though we cannot think of any use for a piping plover, for instance. We protect whales and will incur costs to save stranded ones not because the whales are "useful" as commodities, but because we value their existence. Unique resources, such as majestic canyons and rivers like the Grand Canyon and the Hudson River, are valuable to society not only for their actual uses as parks, waterways, or recreational facilities, but because they just are.

By prohibiting recoveries predicated on these values, S. 8 ignores the costs borne by government to protect and safeguard these resources. Under S. 8, a spiller who kills endangered species may not have to pay any damages whatsoever when it is not possible to restore the species through a breeding program, even though government may have expended thousands of dollars that year alone to protect the species. There is no doubt that the resource has been injured and that we, the public, have suffered damages, yet we will have no remedy under S. 8.

Moreover, the provision is susceptible to misuse in litigation. It will certainly be used in legal arguments to oppose restoration plans in situations where nonuse values predominate and influence a plan's conclusion that the cost of restoration is not disproportionate to the benefits of restoration.

There are numerous safeguards in our legal and political systems to prevent the inappropriate use of nonuse values. The settlements reached in natural resource damage cases to date reflect trustees' common-sense utilization of the economic concepts relating to both use and passive use valuation. New York urges that this provision be dropped from the bill.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

ADOPTED SUMMER MEETING, JUNE 22–26, 1997, JACKSON HOLE, WYOMING

RESOLUTION—SUPERFUND REAUTHORIZATION

WHEREAS, the Attorneys General of the States have significant responsibilities in the implementation and enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and analogous state laws, including advising client agencies on implementation of the cleanup and natural resource damage programs, commencing enforcement actions when necessary to compel those responsible for environmental contamination to take cleanup actions and to reimburse the states for publicly-funded cleanup, and advising and defending client agencies that are potentially liable under CERCLA;

WHEREAS, the Superfund programs implemented under CERCLA and analogous state laws are of critical importance to assure protection of public health and the environment from uncontrolled releases of hazardous substances at thousands of sites throughout the country;

WHEREAS, Congress is currently considering legislation to amend and reauthorize CERCLA;

WHEREAS, to avoid unnecessary litigation and transaction costs over the interpretation of new terms and new provisions, amendments to CERCLA should be simple, straightforward, and concise;

WHEREAS, the National Association of Attorneys General has adopted resolutions in March 1987, July 1993, and March 1994 on the amendment of CERCLA;

STATE ROLE

WHEREAS, many state cleanup programs have proven effective in achieving cleanup, yet the CERCLA program fails to use state resources effectively;

WHEREAS, state programs to encourage the cleanup and redevelopment of underutilized “brownfields” are making important strides in improving the health, environment, and economic prospects of communities by providing streamlined cleanup and resolution of liability issues for new owners, developers, and lenders;

FEDERAL FACILITIES

WHEREAS, Federal agencies should be subject to the same liability and cleanup standards as private parties, yet Federal agencies often fail to comply with state and Federal law;

LIABILITY

WHEREAS, the core liability provisions of CERCLA, and analogous liability laws which have been enacted by the majority of the states, are an essential part of a successful cleanup program, by providing incentives for early cleanup settlements, and promoting pollution prevention, improved management of hazardous wastes, and voluntary cleanups incident to property transfer and redevelopment;

WHEREAS, the current CERCLA liability scheme has in some instances produced expensive litigation, excessive transaction costs, and unfair imposition of liability;

REMEDY SELECTION

WHEREAS, constructive amendments to CERCLA are appropriate to streamline the process of selecting remedial actions and to reduce litigation over remedy decisions;

NATURAL RESOURCE DAMAGES

WHEREAS, constructive amendments to CERCLA are appropriate to make it less complicated for natural resource trustees to assess damages and to restore injured natural resources, and to reduce the amount of litigation that may result in implementing the natural resource damage program.

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL urges Congress to enact CERCLA reauthorization legislation that:

A. State Role

1. Provides for delegation of the CERCLA program to qualified states, and for EPA authorization of qualified state programs, with maximum flexibility;
2. Reaffirms that CERCLA does not preempt state law;

3 Ensures that states are not assigned a burdensome proportion of the cost of operation and maintenance of remedial actions and in no event to exceed 10 percent;

4. Clarifies that in any legal action under CERCLA, response actions selected by a State shall be reviewed on the administrative record and shall be upheld unless found to be arbitrary and capricious or otherwise not in accordance with law;

B. Federal Facilities

5. Provides for state oversight of response actions at Federal facilities, including removal actions.

6. Provides a clear and unambiguous waiver of Federal sovereign immunity from actions under state or Federal law;

C. Liability

7. Provides a liability system that: (a) includes the core provisions of the current CERCLA liability system that are essential to assure the effectiveness of the clean-up program; (b) provides incentives for prompt and efficient cleanups, early cleanup settlements, pollution prevention, and responsible waste management; (c) addresses the need to encourage more settlements, discourage excessive litigation, reduce transaction costs, and apply cleanup liability more fairly and equitably, especially where small contributors and municipal waste landfills are involved; and (d) assures adequate funding for cleanup and avoids unfunded state mandates;

8. Provides reasonable limitations on liability for disposal of municipal solid waste;

9. Provides an exemption from liability for “de micromis” parties that sent truly minuscule quantities of waste to a site;

10. Encourages early settlements with *de minimis* parties that sent minimal quantities of waste to a site;

D. Remedy Selection

11. Provides for the consideration of future land use in selecting remedial actions, provided that future land use is not the controlling factor, and provided that remedial actions based on future land use are conditioned on appropriate, enforceable institutional controls;

12. Retains the requirement that remedial actions attain, at a minimum, applicable state and Federal standards;

13. Retains the prohibition on pre-enforcement review of remedy decisions;

14. Provides that cost-effectiveness should be considered, among other factors, in remedy selection;

15. Allows EPA or the state agency to determine whether to reopen final records of decision for remedial actions, as under current law;

E. Natural Resource Damages

16. Clarifies that in any legal action, restoration decisions of a natural resource trustee shall be reviewed on the administrative record and shall be upheld unless found to be arbitrary and capricious or otherwise not in accordance with law, without precluding record review on other issues;

17. Provides that claims for damages for injuries to natural resources must be brought within three years of that completion of a damage assessment;

18. Allows Superfund moneys to be used for assessments of damages resulting from injuries to natural resources and for efforts to restore injured natural resources;

19. Retains the ability of trustees to recover damages based on any reliable assessment methodology;

20. Does not revise the cap on liability for natural resource damages so as to reduce potential damage recoveries;

21. Clarifies that trustees are entitled to recover legal, enforcement, and oversight costs;

F. Brownfields

22. Strengthens state voluntary cleanup and brownfields redevelopment programs by providing technical and financial assistance to those programs, and by giving appropriate legal finality to clean up decisions of qualified state voluntary cleanup programs and brownfield redevelopment programs;

G. Miscellaneous

23. Allows EPA to continue to list new sites on the National Priorities List based upon threats to health and the environment, with the concurrence of the state in which the site is located.

BE IT FURTHER RESOLVED that the CERCLA Work Group, in consultation with and with approval of the Environmental Legislative Subcommittee of the Envi-

ronment Committee, and in consultation with NAAG'S officers is authorized to develop specific positions related to the reauthorization of CERCLA consistent with this resolution; and the Environmental Legislative Subcommittee, or their designees, with the assistance of the NAAG staff and the CERCLA Work Group, are further authorized to represent NAAG's position before Congress and to Federal agencies involved in reauthorization decisions consistent with this resolution and to provide responses to requests from Federal agencies and congressional members and staff for information, technical assistance, and comments deriving from the experience of the state Attorneys General with environmental cleanup programs in their states.

BE IT FURTHER RESOLVED that NAAG directs its Executive Director and General Counsel to send this resolution to the appropriate congressional committees and subcommittees, and to the appropriate Federal agencies.

ABSTAIN: Attorney General Don Stenberg

RESPONSES BY GORDON J. JOHNSON TO QUESTIONS FROM SENATOR MOYNIHAN

Question 1. What is the State's experience with the natural resource damage provisions in the current law? How would that change under the chairman's mark?

Response. New York has been or is the plaintiff in over 25 cases that have sought natural resource damages arising from releases of hazardous substances and petroleum products. In a majority of these cases, the State has settled with responsible parties and recovered funds that are used to restore or purchase wetlands, replant shorelines, enhance groundwater supplies and provide alternative water supplies, and implement other measures relating to the restoration or replacement of damaged or destroyed resources. The right to recover damages has also helped improve remedial measures; aware that a trustee could recover damages for lost interim uses until restoration is complete, responsible parties have agreed to speedier and more extensive remedial measures in order to reduce potential damages.

The chairman's mark will have significant effects on New York's use of the natural resource damage recovery remedy. For instance, when it is not possible to fully restore a contaminated aquifer, funds might not be recoverable that could be used to protect the groundwater from further degradation in compensation for the reduced or completely lost use of the aquifer because the measure of damages only allows for the temporary replacement of services rather than compensation for lost uses. *See*, Section 701(7), adding § 107(f)(1)(E)(i)(I). Arguably, the State also could no longer recover funds to protect or enhance habitats of endangered species—animals or plants which may have little or no use value—unless the habitat itself was degraded because no recovery is allowed for “impairment of nonuse values.” *See* Section 701(7), adding § 107(f)(1)(E)(ii). The State's ability to fully recover for the loss of fisheries, impacts on birds and other species, and related injuries arising from longstanding but continued discharges of chemicals into rivers or lakes may well be jeopardized by changes in the provisions governing pre-1980 releases. *See* Section 701(7), adding § 107(f)(1)(E)(iv)(II). Because the full value of lost interim uses may not necessarily be recoverable—such recovery arguably being limited to the costs of temporary replacement of services—delay in implementing remedies and restoration may work to the advantage of responsible parties, leading to drawn out litigation. *See*, Section 701(7), adding § 107(f)(1)(E)(i).

Question 2. Are the present methods for determining the “value” of natural resources adequate? How will the chairman's mark affect our ability to determine natural resource damages?

Response. The current methods generally are adequate. A trustee will usually follow the procedures set forth in the natural resource damage assessment regulations, 43 C.F.R. Part 43, which provide a range of methodologies that allow a trustee to calculate the full value of natural resources, including the non-market values that often are at the core of the resources' value to society. Using these methodologies, a trustee can calculate damages arising from the destruction or impairment of endangered species, aquifers, beaches, wetlands and other resources that are not traded in a market and thus lack market valuations, and which have significant non-consumptive values, such as existence and option values. *See State of Ohio v. United States Department of the Interior*, 880 F.2d 432, 462–4 (D.C. Cir. 1981) (requiring Interior Dept. to structure regulations “to capture fully all aspects of the loss” as intended by Congress).

The chairman's mark would significantly hinder the determination and recovery of the full value of the loss. The absolute restriction on recovery of non-use values, the restriction on the use of the contingent valuation methodology, an apparent limitation on the recovery of interim lost uses, which is only partially ameliorated by

the ability to recover the cost of a temporary restoration of services, and language implying that modeling may not be used to determine damages each will diminish a trustee's ability to determine and recover damages. Ironically, under both S.8 as introduced and the chairman's mark, the greater the injury to and the more irreplaceable the resource, the less likely that a trustee will recover damages because of the restrictions on recovery for impairment of non-use values and interim loss values; injuries to unique and pristine resources that cannot be replaced or are not currently being used may have very low values under the current versions of S.8.

RESPONSES BY GORDON J. JOHNSON TO QUESTIONS FROM SENATOR WYDEN

Question 1. Does the National Association of Attorneys General support including a clearer, more comprehensive waiver of sovereign immunity in Superfund reform legislation than what is currently provided in existing law. If so, could you explain why NAAG believes it is necessary to clarify the Superfund law's waiver of sovereign immunity and bring it into line with what is already provided for hazardous waste laws in the Federal Facilities Compliance Act?

Response. The National Association of Attorneys General (NAAG) strongly supports a clearer, more comprehensive waiver of sovereign immunity in Superfund reform legislation. This position is reflected in the July, 1997 NAAG Superfund Reauthorization Resolution, a copy of which is attached to my written testimony. NAAG has advocated a clarification of this waiver for approximately ten years. It proposed such an amendment in the 1990 report "From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities" co-authored with the National Governor's Association, and in its July, 1993 NAAG Resolution on Superfund Reform. Numerous attorneys general, including those from Colorado, Washington and New Mexico have testified in favor of such a clarification,¹ and forty-three attorneys general signed a May 3, 1995 letter requesting such a clarification, among other things. On July 10 of this year, 39 attorneys general urged passage of H.R. 1195 introduced by Representative Dan Schaefer's last spring. A copy of this letter is attached. Rep. Schaefer's bill would amend the current CERCLA waiver to accord more closely to the language in the Federal Facilities Compliance Act (FFCA).

NAAG supports a clarification of the waiver of sovereign immunity in CERCLA to enable Federal, State and local regulators to hold Federal facilities to the same standard that is applied to private parties. Although section 120(a) currently contains a waiver, it does not include the detailed, explicit language that appears necessary to avoid litigation with the Department of Justice and to withstand ultimate judicial scrutiny by the Courts which are compelled to construe any perceived ambiguity in favor of the sovereign. The waiver language in section 120(a)(4), pertaining to liability under State law, is particularly weak, and must be replaced with language similar to that in the FFCA to avoid fruitless disputes with recalcitrant Federal agencies.² The fact is, as Senator Stafford remarked a decade ago, "no loophole, it seems, is too small to be found by the Federal Government."³ Clarification of the waiver of sovereign immunity is necessary to eliminate some of the loopholes that the Federal Government has already found, and to ensure that more State and Federal resources go to determining how best to comply, and not to disputing and litigating over whether compliance can be compelled.

Question 2. Another important issue involving Federal Facilities is whether an interagency agreement like the Hanford Tri-Party Agreement can be used by Federal agencies as an excuse not to have to comply with otherwise applicable environmental laws. This was the issue in the Heart of the America case. Has this issue been resolved or are there still outstanding issues about Federal agencies' responsibility to comply with environmental laws during the course of cleaning up Hanford and other Federal Facilities?

Response. The issue raised by the *Heart of America* case has not been resolved. The United States argued successfully in that case that the existence of the Tri-Party Agreement at Hanford brought all environmental activities at Hanford under

¹ See e.g., Testimony of Tom Udall, Attorney General of New Mexico before the House Subcommittee on Commerce, Trade and Hazardous Materials of the House Committee on Commerce, October 26, 1995; Testimony of Christine Gregoire, Attorney General of Washington before the Senate Committee on Environment and Public Works, April 24, 1996; Testimony of Gale Norton, Attorney General of Colorado before the Senate Subcommittee on Superfund, Waste Control, and Risk Assessment, Committee on Environment and Public Works, May 9, 1995.

² See, Everett, H., "Federal Sovereign Immunity and CERCLA: When is the United States Liable for Costs," 9 J. Natural Resources and Environmental Law 479 (1994). A copy of this article is attached.

³ 132 Cong. Rec. 514903 (daily ed. Oct. 3, 1986).

the CERCLA umbrella, even those expressly delineated in the Agreement as activities that would be regulated pursuant to State authorities. As a result, citizens were precluded by the pre-enforcement review ban in section 113(h) of CERCLA from enforcing applicable State law.

Although the ruling was limited on its facts to citizen suits, States are concerned that the Federal Government may argue that its reasoning also applies to State enforcement actions. States have therefore been reluctant to enter into comprehensive agreements at Federal facilities for fear of losing the independent enforcement authorities they would otherwise have. Thus, the case provides a counter-incentive to cooperative relations between the regulators and regulated agency, and stymies efforts to develop sensible, coordinated, efficient responses at these very complicated sites. Language proposed by Representative Schaefer in H.R. 1195 would address this question to the satisfaction of NAAG (see above-referenced July 10, 1997 letter in support of H.R. 1195).

Question 3. Governor Nelson stated in his testimony that NGA supports having applicable State environmental laws apply at Federal Facilities in the same manner that they apply at non-Federal Facility sites. Does NAAG agree with NGA that States should be authorized to apply their state cleanup laws to Federal Facilities?

Response. NAAG concurs with NGA's position that Federal facilities should be treated the same as private responsible parties, and finds no justification for establishing unique delegation and remedy selection procedures to apply to Federal facilities.⁴ Rather, Title II on state role should be modified to include Federal sites. This modification along with other reforms urged by States would allow States to apply their laws at Federal facilities in the same manner that they apply them at non-Federal Facility sites.

⁴See e.g., NAAG Resolution on Superfund Reauthorization, June, 1997. States have urged one exception to this general rule. In the States' Reform Proposals Regarding Environmental Obligations at Federal facilities transmitted to President Clinton by letter dated July 12, 1995 and signed by thirty-eight Attorneys General and eleven governors, States advocated that the transfer of EPA authority at Federal facilities to States with corrective action authority should be automatic. This exception is necessary because at Federal facilities, unlike private sites, EPA cannot act truly independent of its sister agencies.

STATE ATTORNEYS GENERAL
A Communication From the Chief Legal Officers
Of the Following States

July 10, 1997

Honorable Thomas J. Bliley, Jr.
Chairman, House Committee on Commerce
2241 Rayburn House Office Building
Washington, DC 20515

Honorable John Dingell
Ranking Minority Member
2322 Rayburn House Office Building
Washington, DC 20515

Re: Waiver of Sovereign Immunity by the Federal Government in Clean Water Act and
Comprehensive Environmental Response, Compensation, and Liability Act

Dear Chairman Bliley and Representative Dingell:

We write to express our support for H.R. 1194 and H.R. 1195, sponsored by Representative Dan Schaefer, which would strengthen the existing sovereign immunity waivers in the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), respectively. The proposed language mirrors that of the Federal Facility Compliance Act of 1992 and the Safe Drinking Water Act Amendments of 1996, which were passed by the Committee. H.R. 1195 also would ensure that states would not forfeit their independent enforcement authorities when they enter into cleanup agreements with federal agencies.

In 1990, the National Governors' Association and the National Association of Attorneys General Task Force on Federal Facilities published "From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities." In this report, states identified the federal government as the worst polluter in the nation, explained how a lack of independent enforcement authority contributes to federal agency noncompliance, and recommended, among other things, that Congress "amend applicable federal laws to clearly waive federal sovereign immunity from the application and enforcement of federal and state environmental laws." The National Association of Attorneys General strongly supports this position.

Honorable Thomas J. Bliley, Jr.
 Honorable John Dingell
 July 10, 1997
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Although CERCLA and the CWA currently contain sovereign immunity waivers, they do not include the detailed, explicit language that appears necessary to avoid litigation with the federal government and to withstand judicial scrutiny by the courts. The language proposed by Mr. Schaefer would eliminate this uncertainty that leads to wasteful and costly litigation, delays in cleanup, and failed enforcement efforts against federal agencies. Passage of the bills would help to ensure that the federal government complies with environmental laws to the same extent as private parties. In addition, the bills would assist in avoiding the unfunded mandates created when the federal government inappropriately manages waste streams and then, abandons the waste sites within state borders.

To ensure that the federal government is not treated differently than private parties, H.R. 1195 would preclude states from imposing more stringent standards upon federal facilities than upon private parties. This is fully consistent with states' practices and intentions, and we do not oppose this provision.

H.R. 1195, which would clarify that the state and federal governments can coordinate their cleanup activities without risking a loss of enforcement authorities, also would encourage better integration of federal facility cleanups with state environmental requirements. A court decision several years ago raised questions as to whether states could potentially compromise their independent enforcement authority if they entered into agreements with the federal government to coordinate cleanup of a site. This legislation would facilitate coordinated response and prioritization, which is particularly important at large, complex federal facilities.

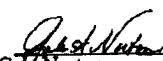
There are those who question whether, given budget deficits, it is feasible to require the federal government to comply with environmental laws to the same extent as private parties. We believe that it is feasible and fair to do so. Gaining control over environmental cleanup and compliance at federal facilities is absolutely critical to protecting the public health and safety of our citizens and communities, to restoring much-needed confidence in the federal government, and to preserving the fundamental tenets of federalism.


Bringing federal agencies into environmental compliance requires a significant, national, long-term commitment. Precious time, money and personnel should be devoted to environmental protection, not to debating and litigating the government's duty to comply. We urge Congress to take another important step toward federal accountability and real cleanup progress by passing H.R. 1194 and H.R. 1195 as soon as possible.

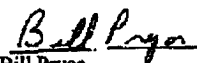
Honorable Thomas J. Bliley, Jr.
Honorable John Dingell
July 10, 1997
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If you or your staff have any questions, please feel free to contact us or Lynne Ross, our Association's Legislative Director, who can be reached at 202-326-6054. Thank you for your consideration of our views.

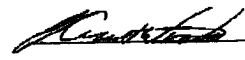
Sincerely,



Gale Norton
Attorney General of Colorado



Christine Gregoire
Attorney General of Washington
Chair, Environmental Legislative
Subcommittee

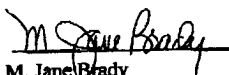

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Bruce Botelho
Attorney General of Alaska



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Attorney General of Arizona

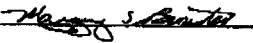

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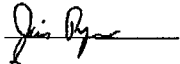

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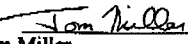

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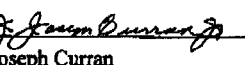
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Honorable John Dingell
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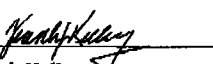

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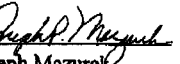

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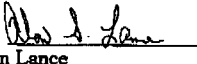

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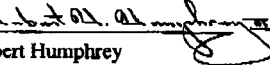

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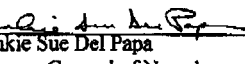

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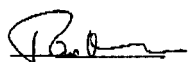

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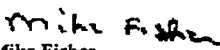
Honorable Thomas J. Bliley, Jr.
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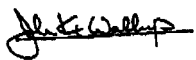

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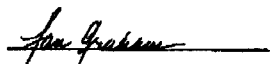

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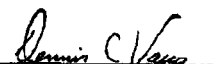

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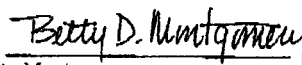

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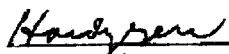

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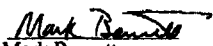

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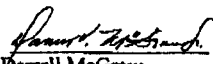

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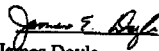

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Dan Morales
Attorney General of Texas


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Darrell McGraw
Attorney General of West Virginia

Honorable Thomas J. Bliley, Jr.
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James Doyle
Attorney General of Wisconsin

cc: Rep. Bud Shuster, Chair
Rep. James L. Oberstar, Ranking Minority Member
Transportation & Infrastructure Committee
Rep. Sherwood L. Boehlert, Chair
Rep. Robert A. Borski, Ranking Minority Member
Water Resources & Environment Subcommittee

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Journal of Natural Resources and Environmental Law
1993-1994

Symposium: The Comprehensive Environmental Response, Compensation, and
Liability Act
Notes and Comments

***479 FEDERAL SOVEREIGN IMMUNITY AND CERCLA: WHEN IS THE UNITED STATES LIABLE
FOR COSTS?**

Holly Everett [FN1]

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In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act [FN1] to respond to the problems associated with abandoned and inactive hazardous waste disposal sites. [FN2] Provisions for financing the cleanup of these sites were also included in this statute. Essentially, CERCLA places the financial responsibility for cleanup on those parties responsible for the hazardous waste site. [FN3] In 1986 CERCLA was reauthorized and amended to include the Hazardous Substance Superfund. [FN4] This fund finances the federal government's response to hazardous waste. Additionally, Congress directed the federal government to use Superfund money for response actions and to recover all response costs from all parties responsible for the waste site. [FN5]

A problem arises, though, when the United States is itself a responsible party. Sovereign immunity may prohibit an action against the United States. Indeed, the United States may not be sued without its consent. [FN6] Consent is given when the United States explicitly waives sovereign immunity. [FN7] The Supreme Court has said waivers of sovereign immunity must be "unequivocally expressed" *480 in the statutory text, construed in favor of the United States, and not enlarged beyond the language of the statute. [FN8]

Courts construing the waivers of sovereign immunity found in CERCLA have reached conflicting decisions. One court has reasoned that CERCLA's remedial purpose leads to an expansive reading of its provisions in order to avoid frustrating the legislative purpose. [FN9] However, all courts do not follow this rationale. Thus, interpretations of the same section often result in different conclusions. This note will examine several recent cases in light of the judiciary's interpretations of CERCLA waivers.

I. STATE ACTIONS AGAINST THE FEDERAL GOVERNMENT

Sovereign immunity may be waived under CERCLA section 120. In *United States v. Pennsylvania Department of Environmental Resources*, [FN10] a court considered whether a state can order the federal government to clean up a federal facility. The Pennsylvania Department of Environmental Resource (DER) tested soil located on the Navy Ships Parts Control Center and found contamination by polychlorinated biphenyls (PCBs). Subsequently, the state

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issued to the Navy Control Center a cleanup order which cited a waiver of sovereign immunity under CERCLA as authority. [FN11] Specifically, Pennsylvania relied on section 120(a)(4) of CERCLA which states:

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality. [FN12]

*481 The United States challenged Pennsylvania's exercise of power under this section.

The United States argued section 120(a)(4) waives sovereign immunity only for state laws that are similar in purpose to CERCLA. [FN13] In effect these state laws would require specific, predetermined standards for cleanup of waste. The United States based this argument on the phrase "removal and remedial action" which it said should be construed in a technical sense. [FN14] According to the United States, Pennsylvania was proceeding under general environmental laws because they permit ad hoc judgments about the cleanup and the standards to be applied. [FN15] Furthermore, the United States asserted the laws were inconsistent with CERCLA's goal of comprehensive cleanup of waste sites because the state laws were limited to only one kind of pollution. [FN16] Hence, the United States claimed it had not waived sovereign immunity for these state laws.

Pennsylvania argued that the United States had read the phrase "removal and remedial action" too narrowly. It pointed to the CERCLA definitions of remove, removal, and remedial action which are very broad. [FN17] The state also noted that section 101(24) includes enforcement activities within the meaning of removal and *482 remedial action. Thus the state argued the laws provided for these actions because they allow the DER to order polluters to clean up sites within the state. [FN18]

The court agreed with Pennsylvania and held section 120(a)(4) waived sovereign immunity. It found Congress must have known of the broad definitions for removal and remedial action when it chose the phrase "state laws concerning removal and remedial action." [FN19] Accordingly, Congress could not have meant to restrict the application of the section to state laws which contain predetermined, objective, and precise standards for deciding when violations occur under state law. To do this, Congress would have included language to that effect in section 120(a)(4). [FN20] Thus, the court held that CERCLA section 120(a)(4) waives sovereign immunity. [FN21]

Recently, however, the First Circuit rejected a state's attempt to recover civil damages from the United States under CERCLA section 120. In *State of Maine v. Department of Navy*, [FN22] Maine filed an action which claimed the United States Navy's shipyard in Kittery, Maine had not complied with Maine's hazardous waste laws. [FN23] The Navy responded to this action by agreeing to comply with state regulations. However, the Navy refused to pay the punitive fines imposed by state law for past noncompliance by claiming sovereign immunity. [FN24]

Like Pennsylvania, Maine argued section 120 waived sovereign immunity. The

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court of appeals, though, rejected this argument. The court noted CERCLA uses language different from RCRA, but held that the reasoning in United States Department of Energy v. Ohio was still dispositive. [FN25]

According to the court, section 120 does not waive sovereign immunity because: (1) the language is unclear, and (2) the legislative history of CERCLA offers nothing with which to distinguish *483 Department of Energy. [FN26] Language waiving sovereign immunity must be "clear and unequivocal." [FN27] The language in CERCLA failed to meet this test because it could refer to prospective coercive fines, retrospective civil penalties, or both. [FN28] Furthermore, the Supreme Court's observation regarding section 6961 of RCRA applied to Maine's argument. In Department of Energy the court said:

[T]he statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future. [FN29]

The court of appeals also rejected Maine's effort to use the legislative history of CERCLA to argue legislators believed section 120 waived sovereign immunity. To do this, Maine relied on comments in a conference report. [FN30] These comments were not helpful to the court because they referred to both section 120 of CERCLA and section 6001 of RCRA, did not describe how CERCLA could or would differ from RCRA, and provided no mechanism for distinguishing Department of Energy. [FN31] Therefore, the court stated Department of Energy required it to hold that section 120 does not provide a clear and unequivocal waiver of sovereign immunity from civil penalties. [FN32]

II. PRIVATE PARTY ACTION AGAINST THE UNITED STATES

A. EPA Regulatory Activity

Private parties have had mixed results in holding the federal government liable. For instance, in United States v. Western Processing Co. [FN33] the court found EPA regulatory activity will not subject the United States to liability. RSR Corp. filed a counterclaim *484 seeking contribution from the United States based on the Environmental Protection Agency's regulatory activity at the Western Processing Site. [FN34]

RSR argued section 107(d)(1) waived sovereign immunity. Section 107(d)(1) provides:

[e]xcept as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person. [FN35]

RSR argued the United States is a person and is liable for negligence. As a result, the EPA should be subject to a separate suit for negligence. [FN36]

The United States asserted it had not waived sovereign immunity under section Copr. (C) West 1997 No Claim to Orig. U.S. Govt. Works

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120(a). This section states "each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent . . . as any nongovernmental entity, including liability under section 9607 of this title." [FN37] Pursuant to section 120(a), government agencies which act as owners, operators, generators, or transporters will be expected to bear their share of CERCLA response costs. [FN38] The United States argued, however, that Congress did not intend to make EPA cleanup and regulatory activities grounds for contribution claims. Doing so would provide for a new defense whenever the United States initiated a cleanup action. [FN39]

First, the United States claimed it would violate the fundamental principle that "those who benefit financially from a commercial activity [should] internalize the health and environmental *485 costs of that activity into the costs of doing business." [FN40] Second, CERCLA calls for strict liability subject only to specific, enumerated defenses. Third, Congress rejected an amendment that would have created a defense for government misconduct and negligence. [FN41] Fourth, the last sentence in section 107(d) merely explains CERCLA has not occupied the field to the exclusion of tort claims. [FN42] Furthermore, the United States argued interpreting section 120(a) to waive sovereign immunity when the EPA carries out its duties would be inconsistent with the strict construction in favor of the United States on sovereign immunity issues. [FN43]

The court found the EPA does not become a liable owner or operator when it carries out its duties. It agreed with the United States that Congress intended for potentially responsible parties to assume costs of cleanup as part of the cost of business. [FN44] Making the EPA liable would "muddle the rationale underlying the statutory scheme." [FN45] In carrying out its duties, the court said the EPA is not behaving like a federal agency which generates its own waste and transports it to the site. [FN46] Moreover, the court agreed that the last sentence in section 107 is more meaningful as a statement on preemption. [FN47] Accordingly, the court found CERCLA does not waive sovereign immunity for contribution claims based on EPA regulatory activities. [FN48]

*486 B. Government as Operator

As Western Processing noted sovereign immunity is waived when the government is an owner or operator. In FMC Corp. v. United States Department of Commerce, [FN49] the court considered when the United States meets the test for being an owner or operator. FMC owned and operated a facility in Virginia from 1963 to 1976. [FN50] FMC sought indemnification from the United States for some portion of its cost of removal and response. [FN51]

Its claim against the United States was based on the operation of a rayon manufacturing facility at the site by the War Production Board from 1942 to 1945. [FN52] FMC said the United States was liable as an owner, operator, or arranger under section 107 of CERCLA. [FN53]

The court made the following findings of fact: (1) the chairman of the War Production Board characterized rayon cord production as "one of the most critical in the entire production program;" [FN54] (2) the facility, then owned by American Viscose Corp., was required by the United States to produce one-third of the cord needed by the nation; (3) the War Production Board ordered American Viscose to convert and expand the facility to produce more high

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tenacity rayon each year; [FN55] (4) the Board set the production levels which were in effect until revoked by the Board; [FN56] (5) the United States leased equipment and machinery to the facility and arranged and oversaw the design and installation of government equipment at the facility; [FN57] (6) the United States directed army officers and others to report to the plant to ensure an *487 adequate work force for production; [FN58] (7) while United States personnel were at the facility, a large amount of highly visible waste disposal activity took place; [FN59] and (8) the United States knew or should have known the disposal or treatment of hazardous substances was inherent in the manufacture of rayon. [FN60] Based on these findings and others, the court concluded the United States was an operator within the meaning of section 107(a)(2), hazardous waste was disposed of while the United States was an operator, and a release or threatened release occurred at the facility within the meaning of section 107(a)(4). [FN61] The United States, therefore, was jointly and severally liable for costs incurred by FMC. [FN62]

Other district courts, however, have ruled sovereign immunity applies only to facilities currently owned by the United States. In *Rospach Jessco Corp. v. Chrysler Corp.*, [FN63] the court considered whether the United States Air Force could be held liable for contamination of a site it owned and operated from 1951 to 1954. The United States argued section 120(a)(4) does not waive sovereign immunity for sites previously owned by the United States. [FN64]

To interpret the statute the court first looked at the language in section 120(a)(4). [FN65] It found that the first sentence was ambiguous, but that the second sentence helped to decide the issue. [FN66] The court said:

[T]he second sentence expressly distinguishes federal facilities with "facilities which are not owned or operated by any such department, agency, or instrumentality." In other words, the comparison is casted in the present tense, suggesting that the reference to "facilities owned or operated by the United States" in the first sentence should be construed in the present tense as well. [FN67]

The legislative history does not indicate Congress intended to permit the United States to be sued regardless of whether it currently *488 owns or operates the facility. [FN68] Moreover, the language throughout section 120 referring to federal facilities is cast in the present tense. [FN69] Therefore, the court held the United States cannot be sued unless it is the current operator. [FN70]

C. Recovering Attorney Fees

Courts have been divided on whether private parties can recover attorney fees. A district court recently considered this issue in light of the split in the circuits. [FN71] In *Chesapeake and Potomac Telephone Co. v. Peck Iron & Metal Co.*, [FN72] C & P asked for attorney's fees and costs of litigation as necessary "response costs" under CERCLA. [FN73] Before the court could consider the question of sovereign immunity, it had to decide if parties could recover attorney fees and costs.

One defendant, Pocket Money Recycling Company, Inc., argued C & P could not recover these costs and fees because they are not provided for in CERCLA.

[FN74] C & P relied on section 101 (25) to argue otherwise. Section 101(25) says: "The terms 'respond' or 'response' means (sic) remove, removal, remedy, Copr. (C) West 1997 No Claim to Orig. U.S. Govt. Works

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and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." [FN75] C & P thus argued the cost of response that may be recovered by a private party and the costs of removal and remedial action that may be recovered by the United States both include the costs of enforcement activities. [FN76] Pocket Money contended *489 that a potentially responsible private party cannot perform enforcement activities as the government would. [FN77]

The court found that CERCLA does allow a private party to perform enforcement activities because section 107(a)(4)(b) allows "any . . . person" other than "the United States Government or a State or an Indian tribe" to recover 'costs of response. . . .' [FN78] As noted in section 101(25), costs of response includes costs of enforcement activities. [FN79] According to the court, Congress would have restricted enforcement activities to the government through the definitions if it did not intend for private parties to perform enforcement activities. [FN80] In addition to the clear language in CERCLA, the court relied on the purpose of CERCLA. The remedial purpose of CERCLA calls upon private parties to participate in cleanup and recovery actions. The court said:

[P]rivate parties which initiate cleanup of contaminated sites and sue their confederates in pollution for contribution, 'enforce' the statute under any reasonable construction of that term. . . . To deny private parties the benefit of the language in CERCLA entitling them to fees and costs expended to draw other polluters into cleanup efforts would create an economic disincentive for responsible parties to take the very action which CERCLA plainly seeks to encourage. [FN81]

CERCLA expressly states private parties can recover costs of enforcement activities in response cost actions.

Having disposed of this issue, the court then turned to whether language in CERCLA waives sovereign immunity for fees and costs. The court noted it did not need to look to other sources because the language in CERCLA is clear. [FN82] It relied on section 120(a)(1) which says:

[E]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally *490 and substantively, as any nongovernmental entity, including liability under 9607 of this title. [FN83] The court concluded the government was held liable to the same extent as nongovernmental entities under section 107. [FN84] Accordingly, private parties can recover attorney fees and litigation costs against the United States.

CONCLUSION

Conflicting decisions regarding waivers of sovereign immunity leave litigants in a state of flux. Interpretations of section 120, for example, have sent different messages to the states. [FN85] The result will be more fighting over which jurisdiction should pay and how much. In a time of scarce resources, the federal and state government will obviously endeavor to hold onto their money.

States and private parties should take note of the requirement that the government be an owner or operator to incur liability. EPA regulatory activity apparently will not give rise to a cause of action based on government ownership or operation. Counterclaims naming the EPA, therefore, will not be

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successful. [FN86] Moreover, litigants may not be able to sue the United States unless it is the current owner or operator. On the other hand, private parties can benefit greatly with the ability to recover attorney fees. Given the cost of litigation, however, the United States could be stretched thin financially.

Each of these cases reveals the importance of careful statutory construction. What seems clear to one court often is not clear to another. Furthermore, the legislative history has not been very helpful to courts construing CERCLA. Congress should provide legislative history for CERCLA that is not mixed with other environmental statutes. Because a waiver of sovereign immunity can mean the depletion of federal resources, it is important for Congress to clarify the extent of the waivers in CERCLA. The reauthorization of CERCLA this year provides an opportunity to do that.

FN1. Senior staff member, JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW; J.D., University of Kentucky, Class of 1994; B.A., University of Louisville, 1990.

FN1. CERCLA ss 101-405, 42 U.S.C. ss 9601-9675 (1988).

FN2. See H.R. REP No. 1016, 96th Cong., 2d Sess. 22 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6125.

FN3. United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir.1989).

FN4. Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter SARA].

FN5. 42 U.S.C. s 9607(a).

FN6. United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1325 (6th Cir. 1993).

FN7. Id.

FN8. United States v. Idaho, 113 S.Ct. 1893, 1896 (1993).

FN9. See United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992).

FN10. United States v. Pennsylvania Dep't of Natural Resources, 778 F.Supp. 1328 (M.D. Pa. 1991).

FN11. Id. at 1330. Pennsylvania relied on the following state laws: Pennsylvania Clean Streams Law, 35 PA. CONS. STAT. ss 691.3, 691.301, 691.307, 691.401 (Purden 1977 & Supp. 1991-92) and Pennsylvania Solid Waste Management Act, 35 PA. CONS. STAT. ss 6018.301, 6018.302, 6018.501, 6018.601 (Purden Pamphlet 1991-92).

FN12. CERCLA s 120(a)(4), 42 U.S.C. s 9620(a)(4) (1988).

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FN13. Dep't of Natural Resources, 778 F.Supp. at 1330.

FN14. Id.

FN15. Id.

FN16. Id. at 1331.

FN17. Id. The definition of remove and removal is found in 42 U.S.C. s 9601(23) which states:

The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

CERCLA s 101(23), 42 U.S.C. s 9601(23) (1988).

The definition of remedial action is found in 42 U.S.C. s 9601(24) which states:

The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. s 9601(24).

FN18. Dep't of Natural Resources, 778 F.Supp. at 1331.

FN19. Id. at 1332.

FN20. Id.

FN21. Id.

FN22. State of Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992).

FN23. Id. at 1009.

FN24. Id.

FN25. Id. at 1010-11. In United States Dep't of Energy v. Ohio, 112 S.Ct. 1627 (1992), the Court held Congress did not waive sovereign immunity for civil fines imposed by a state for past violations of the Resource Conservation and Recovery Act ("RCRA").

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FN26. Department of Navy, 973 F.2d at 1011.

FN27. Id.

FN28. Id.

FN29. Id. (referring to Department of Energy, 112 S.Ct. at 1640).

FN30. Department of Navy, 973 F.2d at 1011 (referring to H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. (1986)).

FN31. Id.

FN32. Id.

FN33. United States v. Western Processing Co., 761 F.Supp. 725 (W.D. Wash. 1991).

FN34. Id. at 727.

FN35. Id. at 729 (referring to CERCLA s 107, 42 U.S.C. s 9607 (1988)).

FN36. Western Processing, 761 F.Supp. at 729.

FN37. Id. at 728 (referring to 42 U.S.C. s 9620).

FN38. Id.

FN39. Id. at 729.

FN40. Id.

FN41. Western Processing, 761 F.Supp. at 729.

FN42. Id.

FN43. Id. at 728.

FN44. Id. at 729.

FN45. Id.

FN46. Western Processing, 761 F.Supp. at 729.

FN47. Id.

FN48. Id. at 729-30; see also United States v. Atlas Minerals & Chem., Inc., 797 F.Supp. 411 (E.D. Pa. 1992). In Atlas Minerals, the E.P.A. began an initial clean-up operation of a hazardous waste site owned by the defendant. After expending over \$1 million dollars, they halted the clean-up activity and

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brought suit for recovery of those initial expenses and to force the defendant to finish the job. The defendant counter-claimed against the E.P.A. because their negligent cleaning efforts actually intensified the environmental damage for which Atlas was liable, allegedly by \$15 million dollars.

Citing Western Processing, the court stated that challenges to E.P.A. response and remedial actions were barred. The court further stated that section 120(a) only applies as a waiver when the government acts as a private party in creating the waste.

FN49. FMC Corp. v. United States Dep't of Commerce, 786 F.Supp., 471 (E.D. Pa. 1992) aff'd, 10 F.3d 987 (1993), and reh'g granted, No. 92-1945, 1994 WL 52831 (3rd Cir. Feb. 23, 1994).

FN50. Id. at 472. The site had been on the National Priority List since 1986.

FN51. Id.

FN52. Id. During World War II, the United States suffered a loss of its crude rubber supply. In order to manufacture tires and other war items, the United States needed a rubber substitute. The best substitute was high tenacity rayon tire cord which was produced at the Virginia facility. FMC presented evidence that the United States managed and controlled the facility during World War II and owned facilities and equipment at the plant. The manufacturing process involved the treatment of hazardous materials, and disposal of the materials necessarily followed.

FN53. Id.

FN54. FMC Corp., 786 F.Supp. at 475.

FN55. Id. at 476-77.

FN56. Id. at 477.

FN57. Id. at 478.

FN58. Id. at 480.

FN59. FMC Corp., 786 F.Supp. at 484.

FN60. Id. at 485.

FN61. Id. at 486.

FN62. Id. at 486-87.

FN63. Rospatch Jessco Corp. v. Chrysler Corp., 829 F.Supp. 224 (W.D. Mich. 1993).

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FN64. Id. at 227.

FN65. Id. (referring to 42 U.S.C. s 9620(a)(4) (1988)).

FN66. Id. at 228.

FN67. Id. (alteration in original).

FN68. Id.

FN69. Id.

FN70. Id.; see also Redland Soccer Club, Inc. v. Department of Army, 801 F.Supp. 1432 (M.D. Pa. 1992). But see Tenaya Assoc. Ltd. Partnership v. United States Forest Service, No. CV-F-92-5375 REC (E.D. Cal. May 18, 1993).

FN71. Two judicial circuits have reached different results. Compare General Elec. v. Litton Indus. Automation Sys. Inc., 920 F.2d 1415 (8th Cir.1990) (allowing recovery of attorney fees) with Stanton Road Assoc. v. Lohrey Enter., 984 F.2d 1015 (9th Cir.1993) (citing the "American Rule" denying recovery of attorney fees unless Congress explicitly authorizes courts to award such fees).

FN72. Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 826 F.Supp. 961 (E.D. Va. 1993).

FN73. Id. at 962.

FN74. Id. Pocket Money relied on the "American Rule" under which a party cannot recover attorneys' fees unless they are provided for by contract or statute, id.

FN75. Id. at 963 (alteration in the original).

FN76. Id.

FN77. Chesapeake, 826 F.Supp. at 963.

FN78. Id.

FN79. Id.

FN80. Id.

FN81. Id. at 964; see also General Electric v. Litton Indus. Automation Sys. Inc., 920 F.2d 1415, 1422 (8th Cir.1990) (holding that a private party recovery action can be an enforcement activity within the meaning of the statute).

FN82. Chesapeake, 826 F.Supp. at 965.
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FN83. Id. (referring to 42 U.S.C. s 9620(a)(1) (1988)).

FN84. Id.

FN85. See supra part I discussing state actions against the federal government.

FN86. See supra note 48 discussing the holding in United States v. Atlas Minerals & Chem., Inc., 797 F.Supp. 411 (E.D. Pa. 1992).

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STATEMENT OF SUSAN ECKERLY, DIRECTOR, FEDERAL GOVERNMENT RELATIONS,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman, members of the committee, thank you for the opportunity to testify today on the recently revised version of S. 8, the Superfund Cleanup Acceleration Act of 1997. My name is Susan Eckerly, and I am the Director of Federal Government Relations-Senate for the National Federation of Independent Business (NFIB).

The NFIB is the nation's largest small business advocacy organization, representing 600,000 small business owners in all fifty states. The typical NFIB member employs five people and grosses \$350,000 in annual sales. Our membership reflects the general business profile in that we have the same representation of retail, service, manufacturing and construction businesses that make up the nation's small business community. NFIB sets its legislative positions and priorities based upon regular surveys of its membership.

I commend the committee for its continued efforts to reach consensus on legislation that will overhaul the Superfund program. We support your efforts to move forward by marking up legislation next week and hope that this Congress will at last put an end to the Superfund liability nightmare for small business. Those caught in the Superfund web cannot wait much longer for relief.

SUPERFUND'S UNINTENDED EFFECTS

When Superfund was originally passed in 1980, it was believed that the number of hazardous waste disposal sites and the costs to clean them up were relatively simple. Unfortunately, that has not been the case. Over the past seventeen years this program has proved to be one of, if not the worst, environmental programs on the books. It has failed to meet its mission of cleaning up hazardous waste sites and instead has encouraged wasteful, excessive litigation that can last for years and cost billions of dollars. Today's system is fraught with the wrong incentives: incentives to prolong cleanup, continue expensive litigation and to drag even the smallest contributor through the lengthy process.

When examining the sites that have been cleaned up, the costs associated with such cleanups, coupled with the staggering amount of money that has gone directly to lawyers' coffers, it is easy to see that the fault and liability system currently in Superfund is flawed. Congress may have envisioned a system that would only catch the few, large, intentional or irresponsible polluters, however, the reality has been very different. There have been over 100,000 different potentially responsible parties (PRPs) identified at Superfund sites. Obviously, a majority of these are not Fortune 500 companies, but are small businesses. Since Congress last reauthorized Superfund, we have experienced an increasing number of complaints and questions from our membership. The effect of the current liability system is permeating all segments of the small business community. No issue in this very complex public policy debate will have a more direct impact on the present and future economic viability of many small businesses than this aspect of Superfund reform. There is not one segment whether it be a retail store, a professional service business, or a construction business that has not been touched.

SMALL BUSINESS ATTITUDES

It is helpful to keep in mind the unique nature of a small business when you examine small business owners' reactions to environmental legislation. Small business owners wear many hats. Two of the most important are being both a business owner and a citizen of a community. They drink the water, breathe the air and fish in the lakes. They want a healthy environment both for themselves and for their children. They also expect the government to be fair and responsible.

It is this lack of fairness and responsibility in the area of Superfund that is causing a groundswell of anger, distrust and in many cases, despair. The committee has heard testimony twice from one of our members, Barbara Williams, a restaurant owner, who is a fourth party defendant at the Keystone landfill in Gettysburg, Pennsylvania. She is being sued for over \$76,000 because she legally dumped her restaurant's trash, which consisted mostly of food scraps. If she is forced to pay this amount, she likely will close her restaurant and her employees will lose their jobs. As Barbara has testified: "This suit defies common sense. I have recycled for years. I used the trash hauler that was approved and permitted by my borough government." With the continuing emergence of these kinds of stories, NFIB began asking our members questions about Superfund in an effort to identify their specific concerns.

Overwhelmingly, our membership indicated that the liability scheme in the current statute was the area they felt needed the most reform. I would like to call your

attention to a study undertaken by the American Council for Capital Formation (ACCF) in conjunction with the NFIB. This study surveyed small business PRP's and asked numerous questions about their experiences with Superfund. Approximately 70 percent of the 5,000 small PRP's surveyed indicated that the liability system was the major burden of Superfund. And at the 1996 White House Conference on Small Business, reform of Superfund's liability was voted by the conference as the group's fifth highest priority. Thus, our focus has been on the liability system and how to make it more equitable and efficient for the small business owner.

Liability—Small Business Concerns

What are the small business problems with regard to liability? NFIB members have identified three major problems. First, the nature of Superfund encourages litigation. In most cases, our members are dragged into the process by being named as a PRP in a third party lawsuit. They are forced to spend thousands of dollars and an excessive amount of their time defending themselves when they have done nothing wrong or illegal or have no records to prove their innocence.

Second, they are forced to remain in the liability scheme when many times small businesses could and should be eliminated from the lengthy settlement process through exemptions. These businesses contributed a minute amount of waste, and it frankly is a waste of time and money to include them in the process. Nothing is gained—either for the economy or the environment—when businesses are forced to close their doors due to the lack of reasonable settlement offers.

Third, the retroactive joint and several liability scheme is what our members find most unbelievable and unfair. The fact that they can today be held responsible for past actions that were legal at the time they were undertaken and could be forced to pay for 100 percent of the cleanup costs is un-American and outrageous. It forces our members to choose between two equally bad and unfair decisions: either pay for the cleanup even though you did nothing wrong or face years of litigation, huge legal fees, loss of credit and the threat of bankruptcy.

With the large number of small businesses already entwined in this web and with the increasing threat of thousands more in the future, NFIB's goal is to achieve meaningful reform in this Congress. Given the widespread agreement among the Administration and both parties in Congress that liability relief should be provided to small business, we sincerely hope that these business owners do not have to wait much longer for the rhetoric to become reality.

SUPERFUND REFORM PROPOSALS

As we testified in March, Senator Smith's and Chairman Chafee's bill, S.8, is an important step forward to eliminating the liability nightmare for small business. It contains some excellent reforms, and we appreciate the steps that have been taken to eliminate some of the inequities and burdens placed on small business. We are pleased that the draft chairman's mark, distributed on August 28, contains much of the small business reforms included in S.8.

For the first time, a small business exemption is applicable to those businesses with fewer than 30 employees or less than \$3,000,000 in gross revenues. This will provide much needed relief and an early exit to the truly small businesses who, in most cases, do not deserve to be caught up in the Superfund litigation morass. By identifying an employee and monetary threshold, S.8 approaches reform from a standpoint that NFIB has long advocated.

Both proposals also take positive steps to reform the current liability system by eliminating the liability for those parties involved in co-disposal municipal landfill sites and those parties who contributed only municipal solid waste to a site. Many NFIB members will benefit from this reform.

In addition, S.8 and the revised draft make strong improvements in the current program by including a "de micromis exemption" to exclude the smallest of contributors from Superfund liability. We are disappointed, however, that the draft chairman's mark fails to contain the one-percent "de minimus exemption" included in S.8, as introduced, and instead subjects those contributors to an expedited settlement procedure. Due to the limited financial and legal resources of most small business owners, we believe that both de micromis and de minimus contributors serve no purpose but to delay the process and hinder the ultimate goal of cleaning up our nation's most polluted sites. We hope that you will reconsider this modification.

SMALL BUSINESS IMPROVEMENTS TO S.8

While these liability reforms move in the right direction, there are several areas that NFIB would like to see clarified or that we have concerns with.

NFIB has consistently supported creating an “ability to pay” definition that would become a required criteria when assessing a small business’s contribution during the allocation process or any expedited settlement procedure. We feel that a strong definition that does not leave the burden on the small business owner to bring forward information and initiate the process is necessary. Notification to small business parties should be an automatic requirement in which all small businesses are requested to provide necessary financial documents and then the burden should be on the government to determine small business’ ability to pay.

In addition, NFIB has advocated that EPA and the allocator meet certain time deadlines set forth both in the expedited settlement procedure and in the allocation process. These deadlines, both for the commencement of the allocation process and for *de minimis* settlements, are a necessary ingredient in order to have a more expeditious and decisive process. We feel that such prompt determinations are an essential element if a reformed process is to succeed. To ensure that EPA and the allocator meet these imposed deadlines, we suggest that incentives be included.

Finally, we applaud the exemption for recyclers. NFIB would suggest that the elimination of liability provision be broadened to include oil recycling or refining centers. The parties that sent their oil to these types of sites were not only following the direction of their local governments, they were attempting to improve the environment. They should not be penalized for acting responsibly.

Conclusion

Mr. Chairman, we feel that the revised S.8, in combination with our suggested changes, would address most of the concerns that our members have expressed. If passed, these reform suggestions will dramatically reduce unnecessary litigation, ensure that money will go toward its intended purpose, and most importantly, ensure that sites will be cleaned up in a timely manner. We thank you for this opportunity and for your efforts to address the small business concern with Superfund.

RESPONSE BY SUSAN ECKERLY TO A QUESTION FROM SENATOR INHOFE

Question. The draft chairman’s mark contains a definition for small businesses of 30 employees and three million dollars in gross annual revenue. Does this definition meet other statutory or private sector definitions for small businesses? Please describe other methods for defining a small business.

Response. While there is no standard definition of an average small business, NFIB generally would define a small business as a business with less than 100 employees. We have not included a revenue number because that would vary depending upon the type of the business.

According to the Small Business Administration, the general definition of a small business is:

. . . a business smaller than a given size as measured by its employment, business receipts, or business assets. The SBA’s Office of Advocacy generally uses employment data as a basis for size comparisons, with firms having fewer than 100 or fewer than 500 employees defined as small. [*The State of Small Business*, 1995]

In spite of the SBA’s authority on these matters, most laws and regulations typically devise one of their own. In fact, we have identified 19 statutory recommendations, outside of the tax code, regarding the size of a small business. The following constitute a sampling of the various laws that have small business definitions, thresholds or exemptions.

- Family and Medical Leave Act: requires employers with more than 50 employees to provide unpaid family and medical leave.
- Americans with Disabilities Act: Title I, which relates to the employment of individuals with disabilities, applies to employers with more than 15 employees.
- Age Discrimination in Employment Act: exempts employers with less than 20 employees.
- The WARN Act: exempts employers with fewer than 100 employees from coverage.

PREPARED STATEMENT OF ROBERT N. BURT, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, FMC CORPORATION ON BEHALF OF THE BUSINESS ROUNDTABLE

The Business Roundtable welcomes the opportunity to submit comments on the August 28, version of S.8, “The Superfund Cleanup and Acceleration Act of 1997.” The Roundtable is an organization of the Chief Executive Officers of over 200 of the nation’s largest companies which agree that passing a comprehensive Superfund re-

form bill should be a priority for this Congress. We are pleased, therefore, that the chairman has put this bill forward as the vehicle for consideration by the Environment and Public Works Committee.

While 280 of the sites on the NPL had reached the construction complete stage by June of this year (an additional 139 of these sites have already been delisted), 491 sites still have construction underway and approximately 500 sites are still in the study phase. Moreover, thousands of sites on the CERCLIS list remain as potential NPL sites. The slow pace of this program under current law (the GAO calculates it now takes twice as long to clean up a site as it did 10 years ago), its cost to the economy, the precedents it sets for other cleanup activities and its potential under current law to stretch out well into the next century, make reform a priority among our members. We would urge the committee to proceed to mark-up this bill in a bipartisan way which accommodates honest differences on this issue.

The Roundtable is keenly aware of the differences which can divide opinion on how Superfund should be reformed. The Roundtable is comprised of companies which have paid a large proportion of the over \$18 billion in business taxes which have gone into the Superfund Trust Fund since the law's enactment. The Roundtable also is comprised of companies which have spent some \$30 billion on Superfund settlements over the life of the program, in addition to comparable sums in litigation concerning liability and other aspects of the Superfund program. Some of our members cleaned up sites in the early years of this program's history; while others still have substantial costs ahead of them.

Despite sixteen years of disparate experience among our membership, we are united in our view on the need for reform and have reached basic agreement on how such reform should occur. The considerable debate over this issue over three consecutive Congresses has substantially narrowed our differences on Superfund policy.

In many important ways, S. 8 is consistent with the consensus we have reached in the Roundtable over how best to proceed with reform. However, we would also note that there are important issues which we believe need to be addressed during the committee's consideration of this bill before it can have our full support. Moreover, given the limited timeframe in which we had an opportunity to review this bill, we may find it necessary to supplement these comments as our members review in more depth specific provisions.

Before turning to our concerns and recommendations, let me briefly summarize the principles which we believe need to be part of a comprehensive Superfund reform effort:

- The tax revenue from Superfund must be dedicated to clean up.
- Significant reform of the remedy selection provisions of the law must be achieved, including elimination of the preference for treatment and the mandate for permanent remedies. Liability reform should provide all parties with fair and equitable relief; and not increase the burden on the economy.
- No Superfund taxes should be enacted without comprehensive reform, including reform of the current law's Natural Resource Damages (NRD) provisions.
- NRD should be geared to restoration of proven damages to resources, not to obtaining punitive damages.

In our own analysis of how the current Superfund law should be reformed to enable better performance, we have concentrated on the liability provisions in the law. However, throughout our economic analysis of several liability reform proposals, it has become increasingly clear that liability reform cannot and should not be addressed apart from other issues such as remedy selection, funding and NRD. While we understand this increases the challenge and complexity of the debate, we are pleased that this committee will be addressing Superfund in a comprehensive way.

The following are the ways in which S. 8 is consistent with The Roundtable's position. We also will point out areas where it falls short of our goals or where the intent of the draft is unclear:

Remedy Selection: The remedy selection provisions underscore the need to base cleanup decisions on real rather than hypothetical risks. As drafted, this title of the bill will allow the parties involved in remedial decisionmaking greater flexibility to address site specific characteristics with emphasis on the current and reasonably anticipated uses of land and water resources, taking into account the timing and use of those resources. S. 8 does so while retaining the current goal for protection of human health in the National Contingency Plan (NCP) (i.e., 1×10^{-4} to 1×10^{-6}) and by adding an important new, practical definition for environmental protection based on plant and animal populations. These goals are clear and will not require time consuming revision to the NCP before changes are realized.

We believe that S. 8 has been substantially revised in an attempt to conform the law to the better practices EPA and the states are implementing on groundwater cleanup. This includes distinguishing between the cleanup goals of drinking water

and water used for other purposes, and reinforcing EPA's initiatives to look at the specific characteristics of each site and propose a deliberative, managed remedial approach. Looking at groundwater in separate zones and phasing in needed control measures facilitates this cost-effective, but protective approach.

We would note, however, S.8 does seem to have some confusion in terminology related to groundwater. For example, it is not clear whether the balancing factors cited in the general rule applying to remedies also apply in the case of groundwater, or if the specific groundwater factors take precedence over these.

There is also some need for clarity around the reference to groundwater that is "suitable for use" versus groundwater where the "currently or reasonably anticipated future use" is for drinking water. This is important in that remedial actions must "seek to protect" uncontaminated groundwater suitable for use as drinking water unless technically impracticable. Since the bill provides a very limited definition of what is not suitable as drinking water" and this definition triggers specific control goals, further clarification is needed for this section of the bill.

We are also concerned that land use determinations are made based on site specific factors while the use of groundwater gives substantial deference to state classification efforts which are generally not facility specific.

There also needs to be clarification of whether the bill has created any inflexible mandates. The reference to attaining cleanup goals to the edge of that contamination which is managed in place, might be read so as to in fact eliminate flexibility of site managers to look at the nature and timing of use and other factors. It is the experience of our membership that EPA in its own implementation of its administrative reforms, has gotten away from arbitrary requirements in terms of compliance points and choice of remedial measures. The bill should be clarified to conform to current practice.

While the bill does maintain the current law's preference for treatment, it does so for certain discrete areas. The definition provided appears consistent with sound principles of protection of human health and the environment. It also would appear to maintain flexibility in how actual risk from discrete areas of highly toxic, highly mobile contamination with the potential for human exposure can best be addressed. But it is not clear that this flexibility is sufficiently defined to take into account the unique characteristics of certain types of facilities which affect our membership (i.e., landfills and mining sites).

We would also note the improvements made from prior Congresses in the approach to reevaluating Records of Decision (ROD's). This is an important provision for our membership and to the pace of future cleanup, particularly since many of our members signed ROD's and performed cleanup activity in the early years of this program's operation. We are concerned that the language in the bill can, in certain instances, be interpreted to fall short of current EPA practice.

For example, under current administrative reforms, EPA follows three criteria as the basis for review: (1) changes in the remediation technology which would result in a more cost-effective cleanup; (2) modification of the remediation objectives due to the physical limitations posed by site conditions; and (3) modification of monitoring to reduce sampling, analysis and reporting requirements where appropriate. We would note that only the first of these criteria is a part of S.8's approach and we would recommend adoption of the other two. We also believe it is unnecessary to invite a Governor's veto of the Remedy Review Board's decision because state input to this process is already a part of this bill.

In addressing the ROD review issue we recognize that reform must attempt to balance the competing needs of fairness and program pace. We would emphasize that it is in no one's interest to burden the EPA with having to make decisions on every single ROD currently in the pipeline; or to create a system that puts the Agency in the business of reviewing existing ROD's to the virtual exclusion of negotiating new ones. We believe given the status of sites in the current pipeline and the limits on the number of new sites coming into the system under S.8, the ROD review procedure should not impede program pace.

We agree with the elimination of "Relevant and Appropriate" standards being applied to remedial decisions under Superfund. Historically, this has led to an almost arbitrary application of remedial standards at some sites. Retention of state "applicable" standards as is now proposed, is acceptable if the standard relates to the remedy or to the siting of facilities and applies to the conduct or operation of remedial actions or cleanup levels under state law. However, it is not clear that these applicable state standards must satisfy the balancing criteria which apply to other remedies. We believe they should. Further, the bill requires any more stringent state applicable requirements relating to the remedy or facility siting law promulgated by the state after enactment to be published as a rule and consistently applied. However, the provision appears not to limit these new state standards to those that re-

late specifically to the conduct or operation of the remedy or the contaminants involved. We believe this clarification would improve the bill.

Liability: We believe this section of the bill should significantly decrease the litigation inherent in the current Superfund liability system. It does so by establishing an allocation system which can mitigate much of the inherent unfairness of the joint and several liability system. And, it eliminates liability altogether for small and other appropriate parties, further acting to reduce what is now an almost institutionalized unfairness in the liability system.

On principle we believe all parties should receive uniform treatment under any reformed liability system, regardless of their status as a PRP or the type of site at which they are involved. S. 8 does not adhere to this principle for co-disposal sites at which certain categories of responsible parties would be treated more favorably than others. For example, a generator or transporter of waste at a co-disposal facility is treated more favorably than an owner and operator of such a facility. Moreover, parties at co-disposal facilities are generally treated more favorably than PRPs at other sites, including other, large multi-party sites.

However, we are also aware that co-disposal sites historically have been prone to the type of litigation which is most objectionable under the current Superfund; i.e., third-party cost recovery litigation, often involving literally thousands of small parties. It is our understanding that the basis for the so-called "co-disposal site carve out" is to reduce the burden on the allocation system and reduce these transaction costs. We would also acknowledge that removing the liability of a vast majority of parties at co-disposal sites and thereby eliminating their need for allocation, significantly reduces what may be a burden on the allocation system and should, therefore, facilitate the application of this important feature of the bill to other multi party sites. Moreover, our preliminary economic analysis of the approach to liability reform currently embodied in S. 8 indicates that this approach is affordable within historic EPA Superfund budget levels.

For the majority of parties, the critical element of fairness in S. 8 comes from its revised allocation system. By exempting small business and de minimis contributors early in the process, the bill eliminates the need for these parties to be present or have representation during an allocation. Moreover, the bill has in our view, the appropriate amount of specificity around the allocation process; it appropriately sets forth the authority conveyed to the allocator (including broad powers to discover information), indicates the so-called "Gore factors" as the basis for determining appropriate shares, defines the penalties for non-settling parties, and defines the role of the Administrator in defending the Fund. The definition of orphan share is a step in the right direction with the Fund assuming a pro rata share of the unattributable portion of the orphan. However, as a matter of fairness, The Roundtable believes the unattributable share should be paid fully if resources are available.

We support fairness for those parties already well into the cleanup process, as well as for those newly identified parties. S. 8 precludes those sites already under a settlement agreement from the mandatory allocation procedure. While we would oppose any double recovery of costs, there are conditions under which some sites at which there is an existing settlement should benefit from a mandatory allocation for future costs. These conditions could include the following: very high cleanup costs, a very large orphan share, cleanup costs which are driven primarily by the activities of orphan or recalcitrant PRPs, and viable PRPs that have cooperated with EPA in performing the cleanup work. Under such circumstances, third-party litigation to recover future costs at the site would of course be stayed.

Moreover, we believe the mechanics of payment should be clarified. The language in the bill clearly intends to structure a method for reimbursement for construction costs for lead PRPs (i.e., PRPs which volunteer or are ordered to undertake construction of the remedy at a site). But it is less clear in setting up a specific mechanism to assure that the dollars from the Fund are dedicated for this purpose. Nor is a specific amount for such Fund contribution designated. We believe more specificity needs to be given to issues such as the size of the Fund, how much is available for reimbursement, how the Fund will handle requests for reimbursement that exceed the annual size of the Fund (or the allocated portion), what recourse the PRP has if the government fails to meet its obligations, etc.

These are important issues since under the bill one or more responsible parties will continue to perform work at the site. They will then receive reimbursement from the Fund for any costs incurred after the date of enactment in excess of their allocated share. The Roundtable agrees that PRPs should continue to be the lead at sites to maximize efficiencies in site cleanup. However, we believe the bill, or at a minimum legislative history, needs to be more precise in defining the decision rules under which these performing parties will be reimbursed for amounts spent in excess of their allocated share of responsibility.

Natural Resource Damages: While we acknowledge that the experience with actual NRD claims is relatively limited, the consistently large size of pending claims, coupled with statements by the trustees that additional claims will follow, leads us to conclude that a fundamental reassessment of the current NRD provisions is needed. Claims upwards of a billion dollars, with a majority of those costs based on speculative methodologies and unrelated to what is needed for restoration, clearly warrant the full attention of this committee. It could well be that we make real reforms in the rest of Superfund and accelerate the pace of cleanup, only to find that natural resource damage claims dwarf the transaction costs which are and historically have been associated with the liability and remedy provisions of current law.

S.8 does take steps toward modifying the unconstrained features of NRD provisions of current law. The bill seeks to eliminate so-called non-use damages which are based on the highly speculative Contingent Valuation Methodology (CVM) and unrelated to restoration. Similarly, The Roundtable opposes imposition of past lost use in that it is punitive and not related to the actual injury to the resource.

We are also encouraged by the requirement mandating mediation of NRD claims as a way to fairly reduce the potential for protracted litigation. We are greatly concerned, however, that this sensible approach may be negated by other provisions that trustees may construe as taking away a defendants ultimate right to a de novo trial by jury.

We would encourage the committee to reexamine the language of the bill which describes the objective of restoration and the criteria which Trustees consider in developing alternatives and selecting restoration measures. Specifically, unless a reformed law directs the trustees to select measures which are cost reasonable, there is no mechanism to insure that the ratio of benefits to costs will be balanced. S.8 recognizes this important concept when it comes to selecting remedies, which makes it all the more important to apply this concept to NRD as well.

In addition, it is critical that trustees be given a rational, objective benchmark for when the goal of restoration is accomplished. In our view, the benchmark should be reinstatement of the public's ability to use and enjoy the resource again.

We would note that a number of provisions relating to restoration in S.8 would, if made mandatory, allow trustees and PRP's to get on with the business of restoring injured resources; but because they are discretionary, they likely will lead to protracted litigation. These include all the criteria for selecting restoration alternatives; the reliance on facility specific information and scientifically valid principle in assessing, planning and quantifying restoration costs; conduct of assessments in accordance with regulations; and trustee coordination. These are the critical elements which will define the scope of the natural resource damage program. To truly focus this program on resource restoration, the committee should conclusively decide the parameters under which this will be accomplished, rather than deferring to continued court interpretation and litigation. Moreover, reforms adopted in this bill should apply to pending NRD claims.

Funding: S.8 makes reforms to the current law in a number of ways which will have measurable impacts on the costs of the program. We believe it is important that the authorizing committee continue its close coordination with the funding and appropriating committees on issues which affect how this program will be paid for in the future. S.8 addresses these issues in an indirect way, in particular in limiting future listings on the NPL to an additional 100 sites until the year 2000 and not more than 10 per year thereafter. We believe current assessments of the NPL pipeline by the states and GAO, and EPA's own initiative to trim CERCLIS indicate such limits represent a workable target.

As authorizing legislation, S.8 understandably does not address future funding issues which we believe are critical for this Congress if we are to put the reformed program on a sound financial footing going forward. Yet we believe it is important for this committee to understand our views on enhancing the funding integrity of this program by more closely tying the funding aspects of this program to performance-based objectives.

In this context, we would note that to date, the business community has paid virtually the entire cost of the Superfund program. The major dedicated Trust Fund, which funds EPA's responsibilities, has been funded by three industry taxes: excise taxes on the chemical and petroleum industries, and an across-the-board corporate income tax. In addition, individual PRP's pay the full costs of cleanup and transaction costs on sites at which they take the lead. They also reimburse EPA for Federal oversight costs at those sites.

We would note that the amount of revenues to the Trust Fund, historically from \$1.8 to \$2.2 billion has been significantly greater than appropriations. This has resulted in a significant and growing surplus in the Fund. Due to the surplus and the limitations this bill would place on NPL listings going forward, the opportunity ex-

ists for future funding of the program to be tied to the pace of the program; or, put another way, its success in meeting its goals. The Roundtable members believe future funding for Superfund should be tied to needed NPL site cleanup.

We would further note that “core” or non-cleanup activities have grown to be almost equal to clean up expenditures on EPA led sites. S. 8 addresses the continued pressure for expenditure of funds from the Superfund Trust Fund for brownfields development, community participation, health analysis, and other items not directly related to cleaning up sites on the NPL. And, as indicated by provisions in the State Role Title of S. 8, states will inevitably assume a larger role in the management of individual sites on the NPL. How large a role they play will be determinant in the amount of funds they will require from the Fund as well. We would ask that the committee give special attention to the extent to which it is conveying additional non-NPL related cleanup activity to the Fund.

In this context of providing greater fiscal discipline to the Superfund budget, we note that the limitation on future NPL listings is an important step toward defining a successful end point to the Superfund program, which was not intended to be a permanent Federal Government responsibility. In addition, the inclusion of a “Results Oriented Cleanup” section begins to address the need to impose budget discipline on this program, allowing the Agency the latitude to define how it can best be measured.

We believe additional emphasis needs to be placed on the discussion of how a reformed Superfund will be funded. This discussion should include consideration of constraints on non-cleanup funding, and limitations on moneys raised other than for cleanup purposes. These two provisions represent a constructive step in this direction.

Other Provisions: We would also note S. 8 makes substantial improvements to current law in enhancing the role citizens play in the remedy decisionmaking process. It is the experience of many of our members that such involvement can assist in developing remedies which are truly protective of human health and the environment, while taking into account the specific concerns of communities about comparative risks of alternative remedies. More often than not, citizens are looking to return Superfund sites to some productive use where this is consistent with meeting appropriate health and environmental standards. S. 8 also addresses fundamental issues associated with brownfields redevelopment, including limiting the liability of prospective purchasers and innocent landowners. However, we remain concerned that without additional clarification of future Superfund liability of for PRP’s who undertake cleanup at non-NPL sites, there will be reduced incentive for them to undertake brownfields cleanups at non-NPL sites.

In conclusion, The Roundtable looks forward to continuing to work with the committee in modifying S. 8 to accommodate the diverse range of views on these and other important issues in Superfund. We are prepared to do additional analysis of S. 8’s economic and environmental impact by using of The Business Roundtable’s Programmatic Superfund Model. Additionally, we are prepared to respond to amendments to S. 8 as offered by members of the committee during mark-up. We thank you for this opportunity to comment.

PREPARED STATEMENT OF KAREN FLORINI, SENIOR ATTORNEY, EDF; ACCOMPANIED
BY JACQUELINE HAMILTON, SENIOR PROJECT ATTORNEY, NRDC

INTRODUCTION

On behalf of the Environmental Defense Fund (EDF) and the Natural Resources Defense Council (NRDC), I appreciate this opportunity to discuss the revised version of S. 8, the “Superfund Cleanup Acceleration Act of 1997,” amending Superfund. EDF and NRDC have been actively involved in the Superfund reauthorization process, serving on EPA’s NACEPT Committee on Superfund and on the National Commission on Superfund, and testifying repeatedly on Superfund during the last two Congresses. Most recently, I testified before this committee’s Subcommittee on Superfund, Waste Control, and Risk Management regarding the initial version of S. 8 on March 5, 1997.

While some of the most problematic features in S. 8 as introduced have been moderated,¹ we believe that there are still numerous fundamental flaws in the bill as

¹In particular, we are glad to see that the “polluters in charge” provisions of S. 8 as introduced—under which polluter-written cleanup plans could have been approved by default—have been deleted. We also applaud the fact that the revised bill no longer allows Potentially Responsible

Continued

revised, compelling us to continue to oppose the bill in its current form. These include features that will make cleanups less protective, disempower communities (particularly where authorities are transferred to States), and let large industrial polluters escape liability without policy justification and with unacceptable consequences for the future of the cleanup program.

In addition, numerous provisions, taken together, will dramatically slow the pace of cleanups. This is a particularly inopportune time for doing so, given that the Superfund program has finally begun to make substantial progress in recent years.

We urge Congress not to turn back the clock to an earlier era in which Superfund cleanups were abysmally slow. In particular, Congress must not divert funds needed for cleanups to sweeping liability carve-outs for polluters who can well afford to pay to clean up the messes they have made, nor divert EPA's resources by creating unnecessary, time-consuming new tasks. Rather, Congress should:

- adopt a targeted set of broadly supportable provisions to enhance program effectiveness and public participation,
- increase funding to allow cleanups to proceed as promptly as is consistent with good decisionmaking and full public participation, and
- reinstate the now-defunct taxes that help finance the program.

We would welcome an opportunity to work with the committee in developing a bill meeting these objectives.

The remainder of this testimony focuses on our principle criticisms of the current version of S.8, the August 28 "Draft Chairman's Mark." Because the draft bill was made available to us only 4 business days before today's hearing, please note that we may subsequently identify additional concerns.

I. COMMUNITY DISEMPOWERMENT: HOW S. 8 MAKES COMMUNITIES IRRELEVANT

Almost everyone agrees that early, robust public participation pays handsome dividends in avoiding controversy—and thus cleanup delays—down the line. Accordingly, it is surprising as well as disappointing that a bill denominated the Superfund Cleanup *Acceleration* Act would contain numerous provisions that systematically curtail public participation in key contexts, most notably those involving state roles.² While EDF and NRDC do not oppose a greater role in cleanup for states that have adequate resources, authorities, and commitment, this expansion must not occur at the expense of curtailing the public's role in Superfund cleanups.

Yet just such curtailment could well result from the state role provisions in Title II of S.8 as revised. Problems with S.8's state role provisions include the *process* through which delegation or authorization occurs, as well as the *consequences* of delegation or authorization. In effect, both communities and EPA are forced to trust that state programs will contain adequate community involvement provisions without any way of verifying that such provisions will indeed be included—and without meaningful recourse if they are not. Similar problems exist in Title I, the Brownfields title. Both are discussed below.

A. *Curtailing community participation through inadequate state role criteria and procedures*

Public participation is conspicuous by its absence from the list of criteria for EPA to evaluate in making delegation determinations [SCAA § 201, adding CERCLA § 130(e)(3)(C), p. 44]. To make matters worse, the bill expressly precludes EPA from including any conditions regarding public participation (or anything else) in approving a delegation request [§ 130(e)(4)(D), p. 46]. Similarly, for authorization, states merely are required to have "procedures to ensure public notice and *as appropriate* opportunity for comment" on cleanup plans [§ 130(c)(1)(C), p. 37]—a loophole potentially big enough for a proverbial Mack truck. Similar language exists for Brownfields programs [SCAA § 102(b), adding CERCLA § 128(b)(2), p. 15].³

Not only is public participation omitted as a *criterion* for transfer of authorities to States, but the public is excluded from decisions about *whether* to transfer such authorities. There is no allowance for public notice and comment in proceedings ei-

Parties to serve as voting members on the Community Advisory Group [SCAA § 303, adding CERCLA § 117(h), p. 72]. And we support the provision dropping the requirement in existing law for matching contributions for Technical Assistance Grants [SCAA § 303, adding CERCLA § 117(g)(2), p. 80], and expressly allowing up-front payments for TAGs.

²Although the community Participation provisions, Title III of S.8 are an improvement over existing law, they will be largely irrelevant for all sites transferred to states given the weaknesses of Title II's state roles.

³This weakness in the Brownfield title is especially objectionable because NPL sites are (inappropriately, in our view) eligible to be included under Brownfield programs [SCAA § 102(b), adding CERCLA § 128(c), p. 16].

ther for delegation or authorization. The public is even more emphatically excluded from participating in the context of “expedited authorization” applications, given that states meeting any 3 of 5 specific criteria are “conclusively presumed” to warrant authorization [§ 130(d)(1), p. 38]. And expedited authorizations cannot be challenged in court [SCAA § 130(d)(4)(D), p. 42]. So, if there are grave deficiencies in a state’s program, the public will have no opportunity to call these to EPA’s attention. Similarly, the public will have no opportunity to voice concerns about state enforcement authorities despite the fact that even *delegated* states are to use state enforcement authorities [§ 130(e)(1)(C), p. 43].

Moreover, the bill’s liberal use of default approvals mean that delegation or authorization can occur without *any* actual review by EPA of the adequacy of the state program. Decisions about toxic waste dump cleanup programs are too important to be relegated to the flipping of pages on a calendar. This is true regardless of the cause of any bureaucratic delays in making decisions—whether they be due to a personal tragedy that befalls an EPA reviewer, or a change of personnel, or a government-wide shutdown, or even simple inertia. Deadlines play a legitimate role, but default approvals do not.

B. The draconian consequences of state delegation and authorization

Exclusion of the public from authorization and delegation decisions is particularly troubling because those decisions have profound consequences under S.8 as revised. For example:

- State roles override CERCLA’s citizen-enforcement provisions, because the bill provides that neither EPA nor any other person can take judicial enforcement action against any person regarding a transferred site [SCAA § 201, adding CERCLA § 130(h)(4), p. 52]. Thus, citizens will be unable to use existing § 310 of CERCLA even to enforce cleanup agreements. The Brownfields title contains similar strictures for facilities “subject to” state cleanup plans, apparently regardless of whether those plans meet any criteria whatsoever [SCAA § 103, adding CERCLA § 129(b)(1), p. 18]. These limitations are radical and unwarranted departures from prior law not only under Superfund, but indeed virtually all Federal environmental programs. There is no justification for barring citizen enforcement of Superfund requirements.
- State delegation/authorization eliminates virtually all EPA authority. The public needs and deserves an effective Federal fallback where states fail to carry out their environmental responsibilities appropriately for toxic site cleanups, just as occurs for air and water pollution programs. Yet, extraordinarily, the bill provides that EPA cannot act at a site covered by a delegation agreement unless the agency goes to court and obtains a declaratory judgment that the state has failed to make reasonable cleanup progress [SCAA § 201, adding CERCLA § 130(h)(4)(B)(ii)(II), p. 53]. For a bill that supposedly seeks to accelerate cleanups and reduce litigation, forcing EPA to wait helpless pending completion of a lawsuit against a state is as curious as it is counterproductive. Provisions almost as onerous apply in the Brownfields title, with regard to any facility that is “subject to” a State remedial action plan—despite the fact that EPA apparently has no role in reviewing state remedial programs at all [SCAA § 103, adding CERCLA § 129(b)(4), p. 18].

All the preceding problems are compounded by the fact that the bill offers EPA no option of partial de-delegation or de-authorization. Instead the only option is the “nuclear” one of total program withdrawal—a seldom-used tactic.

C. Other features that undercut effective public participation.

In addition to the state role and Brownfields provisions discussed above, several other features of the bill undercut public participation as well. These are briefly discussed below.⁴

1. Shutting the Public Out through Silent Vetoes.

Yet another way the public is shut out of meaningful participation arises from provisions under which new sites can be added to the Superfund list “only with the

⁴ In addition, the presumptive remedies section as now written further disempowers communities. While the concept of presumptive remedies can be beneficial, S.8 as revised seems to make the presumption an irrefutable one—regardless of community concerns. Specifically, the bill provides that the Administrator may select a presumptive remedial action “without consideration of (other) technologies, approaches, or methodologies” [SCAA § 403, adding CERCLA § 132(c)(2), p. 120]. This could be read to allow the Administrator to adopt a presumptive remedy regardless of community views at a particular site. At the same time, the bill specifies that identification of presumptive remedies does not constitute rulemaking and need not go through public notice and comment procedures [§ 132(b)(3), p. 120]. The text of the bill should make clear that nothing in the presumptive remedy section authorizes EPA to disregard comments and alternative remedies suggested by interested parties at sites for which presumptive remedies exist.

concurrence of the Governor of the State” in which the sites are located [SCAA § 802, adding CERCLA § 105(i)(3), p. 246]. Similarly, a state can block any administrative cleanup order under § 106 by failing to concur within 90 days [SCAA § 103, adding CERCLA § 129(c), p. 20].

While it may be appropriate to give states “first dibs” on cleanups at sites that will be appropriately addressed through state action, these provisions go much too far. A state could, through simple inaction, bar an NPL listing or a 106 order even though the site will not otherwise be cleaned up. The State need not even give any reasons for failure to concur, inviting potential abuses (if, for example, a major PRP at the site also happened to be a campaign contributor to a high-ranking State official). Moreover, these provisions invite creation of “pollution havens” by Governors seeking to lure business from other states by declaring an indefinite moratorium on NPL listings. EPA should defer to a state program only upon affirmatively determining that the State will conduct an adequate, timely cleanup absent the listing or 106 order.

2. *Shifting the Public Out of Cleanup Decision Revisions.*

As written, the bill’s provisions for reopening existing cleanup decisions essentially eliminate opportunities for effective public participation. Given that review boards are to complete their review within 180 days [SCAA § 406, adding CERCLA § 136(d), p. 144], communities often will have inadequate time to receive notice and respond. This is particularly true at sites where no Technical Assistance Grant is currently in place. (Even where TAGs already exist, the limited number of community-oriented technical experts would be unable to provide effective support if large numbers of reopener petitions are submitted—a possible outcome under the bill as now drafted, see section III below.) To assure that the public is meaningfully involved, the Administrator should be able to extend the deadline for the Board to complete its review.

II. S. 8’S INADEQUATE CLEANUP PROVISIONS

Although the revised version of S.8 has dropped the egregious provisions that let polluters run the cleanup decisionmaking process, the remedy title still has several major deficiencies that make it highly objectionable. These include a preference for treatment of “hot spots” that is worse than useless; critical omissions from the range of cleanup objectives; and important weaknesses in the cleanup standards themselves. These are discussed in turn below.

A. *The hot spots “preference”*

Given current EPA practice of cleanup up to unrestricted use at only one-third of sites even with the existing preference for treatment, we have increasing reservations about whether there is any rationale for changing this portion of the law. However, if the preference for treatment contained in current law is to be narrowed, it is essential to provide a preference for treatment of “hot spots.” While S.8 as revised now includes such a preference, as currently drafted it applies only when contaminants “cannot reliably be contained” and “present substantial risk . . . because of high toxicity . . . and high mobility” and there is “a reasonable probability of actual exposure based on site-specific factors” [SCAA § 402, amending CERCLA § 121(c)(3), p. 108].

Such an approach is highly objectionable because it implies that treatment will occur only when these onerous and unworkable requirements are met. More generally, this approach entirely misses the point of having a preference for treating hot spots: to avoid intrinsically uncertain guesstimates about whether material cannot reliably be contained, and whether and how future exposures will occur. Because it is impossible to see into the future with the level of confidence these phrases suggest, a preference for treatment is vital.

Another approach to this issue may also warrant consideration. The current statute’s preference for treatment and mandate for permanent remedies have caused problems primarily at sites with high volumes of low-toxicity wastes. That problem could be dealt with explicitly, by maintaining the preference for treatment while creating an exception for high-volume, low-toxicity sites. Rather than making containment the rule and hot spots the exception, Superfund would maintain treatment as the rule and make the problematic type of sites (high-volume, low toxicity) the exception.

B. *Weaknesses in institutional controls provisions*

Even with Superfund’s existing mandate for permanence and broad preference for treatment, many sites have been cleaned up only part way, to a degree that allows for some but not all types of use of land or water (*e.g.*, industrial use only, or no

excavation). To assure that restricted-use sites are in fact only used in a manner consistent with their restrictions, legal mechanisms known as “institutional controls” may be employed. Unfortunately, while S.8 would do much to increase the prevalence of restricted-use sites,⁵ it provides no real assurance that any institutional controls adopted as part of such cleanups will actually work. As experience at Love Canal itself amply illustrates, institutional controls that fail can be a disaster on many fronts.⁶

Among other problems in this critical section, the definition of “institutional controls” is itself overly broad [SCAA § 402, amending CERCLA § 121(c)(4)(A), p. 1 10]. While zoning, land use plans, and notification systems may be extremely valuable as supplements to institutional controls, these devices are too ephemeral and/or too weak to serve as institutional controls in this context: protecting human health and the environment from the effects of toxic contaminants left on land or in water after cleanup activities are “complete.”

Similarly, the bill’s current “requirements” for institutional controls—that they are “adequate to protect human health and the environment,” “ensure . . . long-term reliability,” and “will be appropriately implemented, monitored, and enforced”—are far too vague to be meaningful [SCAA § 402, amending CERCLA § 121(c)(4)(c), p. 112]. Rather, the bill must explicitly require that specific criteria be met for any institutional control that is adopted as part of a remedy. These include, at a minimum:

- permanence (i.e., the control will remain in effect until removed following an affirmative, site-specific determination that it is no longer needed because the contamination is gone);
- universality (i.e., applies to all current and future interest-holders of the land or water);
- enforceability (i.e., by all interested parties, including citizens); and
- permanent notice (i.e., in land records unless inappropriate given the specific nature of the control).

Given the Byzantine complexity of much of American property law, some jurisdictions may lack mechanisms that meet these criteria. Congress should create an array of Federal institutional controls to assure that qualifying mechanisms are available in all jurisdictions. The only other alternatives are either unlikely (disallowing institutional controls in jurisdictions that lack qualifying controls and requiring that *all* sites be remediated to unrestricted use) or intolerable (allowing use of inadequate institutional controls).

C. Weaknesses in cleanup standards

The cleanup standards in S.8 continue to commit critical sins of omission. In particular, there is still no explicit requirement for protecting the health of children and other highly susceptible or exposed groups.⁷ Likewise, “protection of health” is still defined as a cancer risk in the range of 10^{-4} to 10^{-6} [SCAA § 402, amending CERCLA § 121(a)(1)(B)(i)(1), p. 85], but without the National Contingency Plan’s provision specifying that 10^{-6} is the “point of departure.” As a result, cost considerations are likely to tilt remedies toward the less-protective outcome, since cleaning up to a less-protective level is almost always cheaper.

Similarly, S.8 continues to lack explicit objectives of protecting clean groundwater, and making contaminated land and groundwater available for beneficial use. These important objectives have, until now, been inherent in the program, given the existing mandate for permanence and preference for treatment. If those provisions are to be narrowed, the list of objectives must grow (with the recognition that not every remedy may be able to attain these additional objectives).

While the revised bill has taken some steps in this direction, it does not go far enough. Beneficial use of land is now included, but only as one element in develop-

⁵ For example, the bill expressly provides that use of institutional controls is “to be on an equal basis with all other remedial action alternatives” [SCAA § 402, amending CERCLA § 121(c)(4)(E), p. 112]—despite the fact that institutional controls are inherently more uncertain than treatment-based remedies. The bill also requires facility-specific risk evaluations to “consider the use of institutional controls” [SCAA § 403, adding CERCLA § 131(b)(1)(D), p. 116].

⁶ Love Canal is a classic illustration of the failure of institutional controls. The deed contained a notice of the presence of chemical wastes, but a subsequent owner eventually disturbed the waste when doing construction on the site. See *U.S. v. Hooker Chemicals & Plastics Corp.*, 722 F. Supp. 960,962 (W.D.N.Y. 1989).

⁷ This problem is exacerbated by the fact that the bill calls for use of central estimates in risk communication principles [SCAA § 403, adding CERCLA § 131(d)(2), p. 118]. This is a specific statistical technique that is *only* appropriate under particular circumstances—ones generally not found in the Superfund context—and are otherwise affirmatively misleading. This language should be stricken.

ing future land use assumptions [SCAA § 402, amending CERCLA § 121(b)(1)(B)(ii)(IV), p. 97]. Protection of groundwater shows up only in an amorphous way—the bill merely provides that remedial action “shall seek to protect uncontaminated groundwater], and “shall seek to restore groundwater to a condition suitable for beneficial use” [SCAA § 402, amending CERCLA § 121(c)(?) (B) & (C),⁸ p. 100]. It is not clear how these aspirational statements relate to the bill’s express objectives and balancing factors. Moreover, even they are “not required to be attained in an area in which any hazardous substance, pollutant, or contaminant is managed in place” [SCAA § 402, amending CERCLA § 121(b)(1)(B)(v), p. 102]—potentially an immense loophole if interpreted to mean areas other than those directly underlying landfills or other clearly and narrowly delineated areas.

More generally, S.8 continues to provide only limited protection for water resources. In particular, protection of groundwater is dependent on its anticipated use—with all the inherent uncertainties of predicting both who will need the water when, and where the water will be at that time—rather than its status as a valuable and limited resource. Moreover, the bill provides that assumptions about future water use are to take into consideration state water use plans [SCAA § 402, amending CERCLA § 121(c)(2), p. 98]. Unfortunately, in many cases, these plans were originally developed with no meaningful public input, often many years prior to the cleanup decisions and in a generalized statewide rulemaking or policymaking context in which it was not clear to any member of the public or affected community that the decision would have any effect upon a particular site’s cleanup.⁹

Finally, one other point bears mention with regard to clean up standards. The bill exempts on-site activities from otherwise-applicable provisions of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) [SCAA § 402, amending CERCLA § 121(a)(1)(C)(i)(II), p. 89]. The bizarre result will be that Superfund sites will be the *only* locations in the United States where untreated hazardous-waste soils can lawfully be placed in substandard landfills. This provision is an artifact of a problem that EPA has already taken formal steps to alleviate, through the proposal of rules tailoring hazardous waste standards to clean up situations.¹⁰ Rather than eviscerating RCRA’s applicability to on-site cleanups, the tailored rules should themselves become the applicable standards.

III. SUPERFUND SLOWDOWN: HOW S. 8 IS THE SUPERFUND CLEANUP DECELERATION ACT?

More than a dozen provisions of the revised bill impose major new or expanded obligations on EPA. But far from assuring that additional resources will be available so that EPA can accelerate the rate of cleanup completions while meeting these new and largely unnecessary demands, the bill does precisely the opposite: it allows dollars now available for cleanups to be diverted to polluter-pays liability rollbacks, with costs shifted from polluters to the Fund, and with no “firewall” between cleanup costs and these pay-the-polluter funds (see discussion below in section IV).

Even beyond the pernicious effect of the changes in liability on the speed and thoroughness of cleanups, S. 8 as revised has numerous features that will slow down cleanups. These include potentially creating expansive new rights to re-open existing cleanup decisions as well as bottlenecks in the Remedy Review Board process, and requiring EPA to issue a slew of complex new rules implementing changes imposed under the Act—most of which are unnecessary and counterproductive.

The ROD re-opener provisions warrant particular scrutiny. Although the bill provides that a re-opener petition “may” be accepted if certain criteria are met [SCAA § 406, adding CERCLA § 136(b)(3)(A), p. 141], under existing case law that language could well be construed to require that all petitions meeting those criteria *must* be accepted.¹¹ Such a result would likely lead to an unmanageable explosion in EPA’s

⁸The numbering of this subparagraph appears to be erroneous.

⁹Moreover, it is not clear what will happen when a State has designated an area as a low priority for protection under one program—such as a classification of groundwater protection program—but as an underground source of drinking water (USDW) in a rulemaking under the underground injection control program. Clearly, the most protective of the state actions should control. In addition, it is important to clarify two additional points: first, that point-of-use devices *may* only be used on a temporary basis (i.e., while more permanent arrangements are being made), or where no other approach is technically feasible; and second, that technical feasibility means what can be accomplished from an engineering and technical perspective.

¹⁰61 Fed. Reg. 18780 (Apr. 29, 1996); The proposal is due to be finalized in the next several months.

¹¹Although we believe that such interpretations are fundamentally inconsistent with the use of the discretionary term “may,” the D.C. Circuit recently adopted just such a reading of section 211(f) of the Clean Air Act. There, the statute provided that EPA “may” grant a petition allowing use of a gasoline additive known as MMT upon finding that the additive would not foul

workload, forcing the agency to divert additional resources from making progress in cleanups to rehashing existing decisions.

Similarly, because the bill creates a new role for the Remedy Review Board in assessing reopener petitions [SCAA § 406, adding CERCLA § 136(b)(3)(A), p. 141], while also requiring Board involvement in reviewing a third of new cleanup decisions [SCAA § 404, adding CERCLA § 134(e)(2)(B)(ii), p. 131], the Board may well become a major bottleneck. To avoid that result, EPA may have to establish multiple Boards, in which case more and more EPA personnel will have to be involved in Boards instead of actual cleanup activities.

With regard to regulations, the bill requires EPA to issue a slew of new rules, most within six months of the bill's enactment. Even aside from forcing EPA to divert considerable resources to re-writing rules, the pendency of this array of rule-making will very likely stall future cleanups, and ongoing ones, while everyone waits to see how the new rules will come out.

Specific rulemaking obligations coming due within 180 days of the bill's enactment include:

- revise the National Priorities List to delete over-lying parcels from NPL [SCAA § 407(b), p. 148];
- revise the National Contingency Plan within 180 days of enactment to reflect changes made by the Act [SCAA § 404, adding CERCLA § 133(a), p. 122];
- issue regulations for providing polluter paybacks [SCAA § 502, adding CERCLA § 112(g)(4), p. 161];
- issue regulations establishing procedures for the remedy review board [SCAA § 404, adding CERCLA § 134(e)(2)(A), p. 130]
- issue regulations for selection of allocators (due within 90 days of enactment) [SCAA § 504, adding CERCLA § 136(d)(3)(A), p. 172];
- issue regulations incorporating Results Oriented Cleanup requirements into the National Hazardous Substances Response Plan [SCAA § 801(b), p. 244];
- issue regulations implementing risk assessment and risk communication provisions (due within 18 months of enactment) [SCAA § 403, adding CERCLA § 131(f), p. 119].

Furthermore, the bill establishes a broad mandatory allocation process that the Administrator must conduct [SCAA § 504, adding CERCLA § 136(b)(1)(A), p. 165]. Allocations are mandatory even for sites at which consent decrees and settlements have long since been established, if any additional costs will be incurred. In addition, the Administrator (or the Attorney General with EPA staff participation) will need to participate in such allocations in order to assure that the Fund is not drained by unduly enthusiastic attribution of expenses as “orphan” shares that will be paid for by the Fund. Given that multi-party sites with 1 or more viable parties currently lacking a final settlement will use the allocation process—potentially covering several hundred sites—this resource drain is likely to prove substantial.

Last but by no means least, several provisions relating to risk assessment will slow down cleanups unnecessarily and will drain EPA resources. For example, the bill requires use of “chemical-specific and facility-specific data in preference to default assumptions whenever it is practicable to obtain such data” in facility-specific risk assessments [SCAA § 403, adding CERCLA § 131(b)(1), p. 116]. This language may force EPA to engage in massive data-gathering, to little purpose. Defaults are appropriately chosen for policy purposes, including protection of health where the science is uncertain. Unless someone makes chemical- or facility-specific data available to the Administrator (and the Administrator concludes those data are reliable), generic default values should be used.¹²

Similarly inappropriate is the requirement to use “the best” science in accordance with “objective” practices [SCAA § 403, adding CERCLA § 131(e), p. 119]. This is ex-

automotive pollution-control systems. EPA made such a finding, but rejected the petition on the basis of concerns about the additive's potential health effects. The court ruled that EPA lacked discretion to consider any factors other than the one expressly stated in the statute, *e.g.*, effect on automotive systems, regardless of the fact that the Clean Air Act's objectives expressly include protection of human health. *Ethyl Corn. v. Environmental Protection Agency*, 51 F.3d 1053, 1058–59 (D.C. Cir. 1995).

¹²Similarly, the bill imposes an unworkable requirement to identify research needs emerging from each risk assessment, and peer-reviewed studies that are relevant to or fail to support estimates of public health effects and methods used to reconcile inconsistencies in scientific data [SCAA § 403, adding CERCLA § 131(d)(4), p. 118]. While such steps can be useful, they should be done generically, not in each risk assessment. Moreover, the requirement in paragraph (d)(5) to discuss individual studies that fail to support any risk estimate is at odds with a weight of evidence approach. It would end up focusing as much attention on a single study that contradicts or fails to support the risk estimate or assumption as the multitude of studies which do support that position.

cessive, amorphous verbiage that invites endless wrangling to no useful purpose. If any such provision is to be included, it should simply direct the agency to use available, reliable data.

IV. OVERLY BROAD LIABILITY “REFORMS”: STILL CORPORATE WELFARE BY ANOTHER NAME ¹³

There is no dispute that Superfund’s existing liability system has often been abused by some Potentially Responsible Parties (PRPs) who have filed massive contribution actions against entities with minimal or no connection to the site. Curbing these abuses is necessary, but does not necessarily require legislation, since EPA routinely provides contribution protection to settling parties.

Even if legislation on this point were viewed as desirable, S.8 as revised continues to go far beyond the boundaries of common sense. The bill inappropriately rolls back liability for vast numbers of companies that are well able to help pay for cleaning up their own messes, and who should remain responsible for doing so. In several instances, these overly broad carve-outs apply to future as well as past conduct, undercutting Superfund’s vitally important incentives for safely managing today’s wastes.

A. The trade-off between liability rollbacks vs. cleanup dollars

Although the bill provides that parties who have already received cleanup orders must carry out the cleanup, it also specifies that they will be repaid for all costs attributable to a party whose liability is limited [SCAA § 502, adding CERCLA § 112(g)(1) & (2), p. 160]. These paybacks apparently apply even for all future costs incurred under existing settlements. Payback payments “shall be made upon receipt” of an application [§ 112(g)(3), p. 160], and must be made within a year [§ 112(g)(6), p. 161]. In addition, parties that settle pursuant to an allocation have “an entitlement” to be promptly reimbursed for any costs they incur attributed to an orphan share [SCAA § 504, adding CERCLA § 136(m), p. 186].

This language creates a legal entitlement, as contrasted with discretion under current law to use the Fund for cleanups and other purposes, so paybacks will have first claim on the funds. Because there is no “firewall” between funds for paybacks and funds for cleanups, all of the moneys in the Superfund could be exhausted providing polluter paybacks, leaving none for actual cleanups, oversight, and enforcement by EPA, as well as vitiating programs for Technical Assistance Grants. If funds remaining in the Superfund are inadequate, one of three outcomes will occur: taxes will have to be raised, cleanup standards will have to be further weakened, or cleanups will again slow to a snail’s pace. The latter two are unacceptable from an environmental perspective, while the first appears politically implausible.

B. Overly broad exemption for “co-disposal” sites

S.8 repeals polluter-pays liability for generators and transporters of industrial wastes at hundreds of “co-disposal” sites at which those wastes were dumped along with municipal trash [SCAA § 501(b), adding CERCLA § 107(t)(1)(B), p. 153]. Even giant chemical companies will get entirely off the hook for wastes they sent to those sites. And even private dump-owners—those in business to make a profit—get their liability capped at 40 percent of cleanup costs (or the cost of closure) [§ 501(b), adding CERCLA § 107(t)(1)(D)(i), p. 156].

C. Overly broad exemption for “small” businesses

While we do not necessarily oppose curtailing liability for truly small businesses with a limited connection to a site who have limited ability-to-pay in any event, the current exemption is ill-crafted. First, the \$3 million annual-revenue threshold is simply too high [SCAA § 501(b), adding CERCLA 107(s), p. 152]. Moreover, the exemption applies to companies with either fewer than 30 employees, or less than \$3 million gross revenues. This potentially exempts wealthy corporations that happen to have few employees.

In addition, the exemption applies to conduct in the future, thus eliminating incentives for small businesses to manage hazardous substances carefully in the future: an unjustifiable “pollute with impunity” clause for small businesses. In addition, any liability exemption for small businesses should be conditioned on cooperating with appropriate information-gathering and cleanup activities. Similarly, the exclusion should be inapplicable where the Administrator determines that the material has or may significantly contribute to the response costs at the site (cf. SCAA

¹³ Because the liability provisions of S.8 as revised are substantially similar to those of S.8 as introduced, this section of our testimony closely parallels the liability section of EDF’s testimony of March 5, 1997.

§ 501(b), adding CERCLA § 107(r)(2), p. 152 (exception to exemption for de minimis contributors)).

V. THE NPL CAP: DUMPING CLEANUPS ON COMMUNITIES AND STATES ¹⁴

Another highly objectionable feature of the bill is its inclusion of an arbitrary cap on the number of additional sites that can be added to the National Priorities List. Under S. 8, EPA can only add a total of 90 sites to the Superfund National Priorities List before 2000, and then 10 sites/year thereafter [SCAA § 802, adding CERCLA § 105(i)(1)(A), p. 245]. A cap has profound consequences because, unless a site is listed, EPA cannot undertake cleanup activities (other than a short-term, low-cost emergency removal). In effect, this provision dumps the problem of Superfund site cleanups into the laps of the States—regardless of whether they have the resources or capacity to conduct those cleanups.

The General Accounting Office recently estimated that the cap could force States to accept responsibility for 1,400 to 2,300 sites (1,100 already identified by EPA, along with an estimated 300–1,200 yet-undiscovered sites). The estimated cleanup costs range from \$8.4 to \$19.9 billion.¹⁵

The GAO report makes painfully clear that the States are in no position to take on this added burden. Indeed, States are having difficulty securing resources for their current cleanup efforts. Of the states surveyed by GAO,

“three of the seven states with active programs said that taking on these additional cleanups would exacerbate an already difficult financial situation. Two other states said that they expect to face funding shortfalls beginning in fiscal year 1997 that will make it difficult to absorb the additional cleanup responsibilities, at least for a few years subsequent to that time. Another two states said that while they had sufficient funds to manage their own inventories, funding the additional cleanups would be difficult.”¹⁶

This provision also undercuts two of the valuable incentives created by Superfund: that which prompts voluntary cleanup of non-NPL sites in order to avoid a potential future NPL listing, and that which prompts careful management of wastes generated now.

An example of Superfund’s effectiveness in the former arena emerges from a recent story in the Cleveland Plain Dealer about the Ashtabula River Partnership, a group that is working to avoid a potential Superfund listing by creating “a better-than-Superfund cleanup plan” for the river’s heavy-metal and PCB contamination problems. The paper quoted Rep. Steve LaTourette (R-OH) as remarking that “[t]he prospect of a Superfund designation has proven to be a more effective tool than the Superfund itself. Without Superfund, however, most parties wouldn’t even be at the table.”¹⁷

Similarly, GAO noted that State program managers “pointed out that a major incentive for private parties to clean up sites is to avoid having their properties added to the list of the most contaminated sites in the country.”¹⁸ In short, a cap on the number of Superfund sites may have the perverse effect of creating a greater need for more Superfund listings, by reducing incentives for non-Superfund voluntary cleanups.

The NPL cap will also undercut incentives for sound prospective waste management. Facilities will be able to gamble that states will lack, or forego use of, cleanup enforcement authorities for tackling sites created after the NPL list is effectively closed. The continuing nominal availability of litigation authorities under § 107 is far from an adequate substitute, given that § 107 suits can only be brought to recoup expenditures—thus requiring cash-strapped States to front all the cleanup money. Where states are unable to do so, today’s polluters will evade cleanup responsibilities, and sites will remain unaddressed.

In short, the cap should be eliminated.

¹⁴Because the NPL cap provisions of S. 8 as revised are identical to those as introduced, this section of our testimony is identical to that in EDF’s March 5 testimony (other than with regard to bill citations).

¹⁵U.S. General Accounting Office, *Impact on States of Capping Superfund Sites*. GAO/RCED-106R. March 1996.

¹⁶*Ibid.*, p. 2.

¹⁷“Toxic Cleanup: Ohioans Aim to Skirt Superfund Listing,” Greenwire (electronic newsletter), June 14, 1995 (synopsis of story from June 11 Cleveland Plain Dealer).

¹⁸GAO, p. 3.

VI. NATURAL RESOURCE DAMAGE PROVISIONS¹⁹

While there have been some improvements in the revised version of S. 8 relating to natural resource damages, there have also been some weakening changes. Most importantly, the draft retains the major deficiencies of S. 8 as introduced: it arbitrarily prevents trustees' from factoring heritage values—the values people place on passing on to their children and their grandchildren a pristine wilderness, a population of endangered whales or a national symbol such as the Grand Canyon—into their restoration decisions and from recovering damages for the impairment of these values. This approach has the effect of valuing least our most pristine and endangered resources.

The revised bill accomplishes this result by retaining the prohibition on the recovery for impairment of heritage values, referred to in the draft as “nonuse” damages [SCAA § 701, amending CERCLA § 107(f)(1), p. 231] and by its prohibition on trustees' recovery for the costs of conducting contingent valuation studies [SCAA § 702, amending CERCLA § 107(f)(2), p. 234], a methodology that Nobel laureate economists recognize as legitimate and that market researchers and businesses use regularly.

Other deficiencies of the revised bill include its limitations on the trustees' ability to recoup for the interim losses that may be suffered pending restoration of damaged natural resources. The bill has at least four significant limitations on interim losses:

- It limits such recoveries to “temporary replacement of the services provided by injured . . . resource” [SCAA § 701, amending CERCLA § 107(f)(1), p. 230; see also, SCAA § 703, amending CERCLA § 107(f), p. 240]. This language artificially limits recoveries to measures that are temporary and replacement in nature (thus precluding acquisition, for example) and also potentially limits recoveries to prospective losses, those for which temporary replacement costs are incurred, omitting compensation for past losses. The term “services” also could be construed too narrowly to mean just human services, rather than ecological services as well.
- It precludes recovery of any lost uses that occurred prior to December 11, 1980 [SCAA § 701, amending CERCLA § 107(f)(1), p. 231];
- It precludes recovery of interim losses, no matter how significant, if the resource has returned to baseline condition before trustees have had a chance either to file a claim or to incur assessment or restoration costs [SCAA § 701, amending CERCLA § 107(f)(1), p. 232]; and
- It prohibits recovery of any lost heritage values [SCAA § 701, amending CERCLA § 107(f)(1), p. 231].

With respect to the selection of restoration options, we strongly support the revised version's deletion of the “reasonable cost” criterion that was in S. 8 as introduced. However, we remain concerned about the criteria that are included [SCAA § 703, amending CERCLA § 107(f), p. 239]. First, we believe they should be listed as considerations, rather than as absolute criteria, as is the case in Interior's regulations. Second, arguably the most important criterion is not even mentioned, namely effectiveness in restoring the resource to baseline. This should be included. Cost-effectiveness is included as a requirement, but the term is not defined. To avoid confusion and to clearly distinguish this criterion from a reasonable cost criterion, a definition of the term should be included. Finally, we strongly object to the limitation placed on the last factor, “timely” to the extent consistent with cost and the other three factors. This factor should be included without limitation, just as the other factors are. The current language renders this factor potentially irrelevant. Natural recovery will tend in many instances to be more cost effective than active restoration. If timeliness is not considered as a separate factor but must always be consistent with what is most cost effective, natural recovery will tend to win out, even if it will take decades to occur.

We strongly object to the deletion from the revised bill of the provision contained in S. 8 as introduced for judicial review of the restoration plan on the administrative record. If the trustee goes through the process of compiling an administrative record, which we believe is highly desirable to ensure openness and fairness in decisionmaking, then the evaluation of the decision reached by the trustee should be based on that administrative record. The deletion of this provision from the revised bill defeats the whole purpose of providing for an administrative record with public participation. It means that a PRP could come into court with entirely new evidence that it kept out of the administrative process and use that evidence to discredit the trustee's restoration plan. There will be no incentive for the trustee to compile an

¹⁹This portion of our testimony was prepared by Sarah Chasis of the Natural Resources Defense Council.

administrative record since the PRP will be free to ignore the process and submit its evidence later in court. This change represents a serious step back from S.8 as introduced.

The revised bill's language on the relationship between response actions and restoration [SCAA § 703, amending CERCLA § 107(f), pp. 239–240] is an improvement over S.8 as introduced, as is the provision for a Federal “administrative” trustee (as opposed to a lead Federal “decisionmaking” trustee).

The provision [SCAA § 705, adding to CERCLA § 113(g)(1), p. 241] allowing for an extension of the current statute of limitations only where, in effect, the PRP agrees (by entering into a cooperative agreement) is ineffective in addressing trustees' concerns on this issue. We strongly recommend that the provision on mediation [SCAA § 706, adding to CERCLA § 136, p. 242] be made optional. To require trustees to go through a mediation process when there is no prospect of cooperation from the PRP only introduces delay and expense into the process. Mediation works only when there is a real interest on both sides; otherwise, it is a waste of time and money and further delays restoration of the resources.

Three final points. We oppose the provision on double recovery which would broaden current law in a number of ways (*e.g.*, by extending to actions brought under state law, as well as Federal law, and potentially limiting recoveries in such state actions for damages other than restoration costs, as well as extending to response actions—which are not designed to achieve restoration) [SCAA § 701, amending CERCLA § 107(f)(1), p. 231].

We also are concerned with the failure to call for the development, as part of the regulations, of simplified damage assessment methods. This combined with the call for “facility-specific” information [SCAA § 702, amending CERCLA § 107(f)(2), p. 233] could be used to call into question the ability of trustees to utilize simplified assessment techniques, which not only save time and money, but ensure that smaller spills and sites are assessed and restored.

Finally, we have serious objections to the grandfathering provision [SCAA § 707, p. 242] that seeks to carve out a special exception for the Clark Fork case in Montana.

CONCLUSION

Thank you for this opportunity to present our views.

PREPARED STATEMENT OF GEORGE J. MANNINA, JR., EXECUTIVE DIRECTOR,
COALITION FOR NRD REFORM

Mr. Chairman, distinguished members of the committee, I am appearing today on behalf of the twenty-three companies and associations comprising the Coalition for NRD Reform. A list of Coalition members is attached as Appendix 1. Mr. Chairman, I would like to begin by thanking you for recognizing that the NRD program needs reform. As the Interior Department's 1994 Report on Reinventing Government stated: “The existing [NRD] process is complex for all parties involved and creates conflict instead of restoring resources.”

When the NRD Coalition formed two years ago, we were told NRD was a small problem involving only a few sites. A scant two years later, Federal trustees state that they want to use their NRD authority at half the NPL sites and at 80,000 surface lagoons, 14 percent of all U.S. lake acreage and 4 percent of all U.S. river miles. EPA's recently completed study of 2,100 watersheds ranked 824 as Priority 1–5 for sediment contamination, but, to date, trustees have asserted major NRD claims at only 10 of the 824 priority watersheds. To put the EPA survey into further perspective, one watershed which EPA placed in its lowest priority category is the subject of an NRD claim of over \$1 billion. The rapidly escalating NRD program also presents a serious problem for the Federal Government, particularly at sites owned by the Departments of Energy and Defense where there is extensive contamination of resources subject to state and tribal authority.

The problem which brings us before you today is that the NRD program has lost its focus on reasonable restoration. Unless the NRD program is reformed, not only will the problems with this program dwarf the well recognized problems of the cleanup program, but any progress made on remedy reform in S.8 will be undone. Remedy reform without NRD reform will be like squeezing a balloon at the bottom, all the air will shift to the top—government agencies will be able to bypass the new remedy requirements under the guise of resource restoration. For example, while S.8 establishes an environmental protection standard tied to population and community level effects on plants and animals, Federal trustees assert that any measurable adverse change in the chemical, physical, or biological environment justifies an

NRD claim. In other words, trustees claim that any change from the so-called baseline—or pre-release—condition supports an NRD claim—even when there is no population or community level impact. If the trustees' definition of injury prevails, reforms to EPA's remedial program can be overridden or rendered moot. Small and large businesses which have engaged in cleanup under EPA standards, agreed to a remedy selection, or entered into a covenant not to sue with EPA can find themselves liable for additional cleanup under the NRD program.

Because trustees define a resource injury requiring NRD action as any measurable adverse change in the chemical, physical or biological environment, Superfund is no longer two programs, cleanup and restoration, but it is three programs: cleanup 1 administered by EPA designed to protect human health and the environment; cleanup 2 administered separately by resource trustees in which trustees can second guess EPA remedial decisions; and natural resource restoration administered by trustees to restore fisheries, wetlands, etc.

S. 8 offers a unique opportunity to fix the problem of having two separate cleanup programs. Unfortunately, the language in the chairman's mark does not clarify the differences between the remedial program and restoration, thereby allowing NRD to remain as a second cleanup program. In fact, we think the trustees will read the first part of proposed Section 703(a) as confirming that NRD is a second cleanup program. We strongly urge you to develop a clearer definition of the objective of restoration. We would like to work with you to address this issue which we believe must be fixed—otherwise the Superfund program will become even slower and more litigious. Trustees for the public should focus on restoring injured public resources and providing the public with appropriate alternatives to use while restoration is taking place—not on creating a second cleanup program.

Having said that, there are provisions in the chairman's mark which we think are positive. The requirements for technically feasible and cost effective restoration are good, as is the requirement for proof of causation and the clarification of the right to seek contribution from other responsible parties. We are interested in the provisions allowing for an extended payment period and would like to better understand your intent.

We are particularly pleased by the intent of the chairman's mark to limit the measure of damages to the cost of restoration, including permanent and temporary measures, and to exclude surplus and punitive damages. However, we are concerned that trustees will circumvent your intent. The chairman's mark states non-use "values" are not allowed. But trustees have begun to change the words, asserting that they are not collecting values and damages but are collecting "compensatory restoration" or determining the proper level of restoration. Non-use claims need to be prohibited regardless of what they are called. We would be pleased to work with you in this regard. Similarly, the chairman's mark does not clearly prohibit the use of the much criticized contingent valuation methodology ("CVM"). The mark only says trustees cannot collect the costs of a CVM study from liable parties. This implies that CVM can still be used. Again, we think a simple fix could be made to prohibit the use of CVM and we would like to work with you to accomplish that.

Since much of the debate on NRD reform has swirled around non-use and lost use damages, it is worth taking a moment to trace the history of these damage claims because the history demonstrates how the regulatory expansion of the NRD program has changed congressional intent and mired the program in controversy and litigation. When Superfund passed in 1980, there was no hint that the NRD program included lost use and non-use damages. Not until 1986 did the Federal regulations introduce the concept of lost use and then it was to require that liable parties pay the lesser of the cost of restoration or lost use. And non-use was only to be considered if it was impossible to restore the resource or to compute lost use damages. Today, trustees claim they can require parties to pay for the full cost of restoration plus past lost use and non-use. If the resource is fully restored, what are past lost use and non-use moneys used for? The answer is that they are surplus to the actual cost of restoration and are punitive damages. A moment ago, I told you that because of regulatory interpretations adopted by Federal trustees Superfund has become three programs, cleanup 1, cleanup 2, and restoration. Based on this regulatory history, I think it is fair to say trustees have added a fourth program not intended by Congress—punitive non-use and past lost use damages. Such damages undermine your intent to limit the measure of damages to the cost of restoration.

In this regard, it is worth noting the most recent regulatory expansion of the NRD program. The trustee's latest view is that lost use also includes surplus resource to resource lost use. In simple English what that means is that trustees are going to attempt to compute the value to the squirrel of having to eat acorns instead of walnuts while restoration is occurring, or the value to a robin of eating bugs instead

of worms—and to file claims for the robin's pain and suffering. That type of lost use will lead to speculative claims, increased litigation, and conflict instead of restoring resources. We hope that your focus on actual restoration precludes this result and we would like to work with you to clarify this issue. The NRD program should focus on restoration.

We also understand your intent is to leave the status quo unchanged on the critically important issue of a defendant's right to a trial. However, we think you have inadvertently changed existing law and may have established record review by (1) referencing Section 113(k) which provides for record review, (2) providing for the creation of an administrative record, which implies that judicial review is based on that record, and (3) repealing the rebuttable presumption which has been relied on by courts as proof that the law requires trial de novo, not record review. The Coalition is unalterably opposed to record review and we believe this section of the chairman's mark must be changed. We cannot understand why the trustees are afraid of a standard which requires that they prove their case in court. We urge you to delete those provisions in the chairman's mark which will be used by trustees to argue for record review under which trustees do not have to prove that their case is supported by the preponderance of the evidence.

Mr. Chairman, as I said at the beginning of my statement, the Coalition for NRD Reform thanks you for recognizing that the NRD program needs reform. We believe important substantive adjustments need to be made to the chairman's mark to better effectuate your policy of reforming the NRD program so that it focuses on real restoration and we look forward to working with you. We also think there are important technical issues which merit additional attention. For example, your double recovery provision only prohibits persons from acting first under Superfund and then proceeding under another statute. The double recovery prohibition should be expanded to run both ways as it does in Section 114(b)(1) so that persons also cannot collect for a natural resource injury under another statute and then proceed under CERCLA for the same injury. The double recovery provision should also prohibit more than one person from recovering for the same resource.

A second technical issue involves the statute of limitations issues. Since CERCLA's existing statute of limitations provides that the statute of limitations begins to run after the promulgation of regulations, and since the courts have ruled the regulations have been issued, one possible reading of the chairman's mark which requires regulations to be issued within two years is that you are reviving claims now barred by the existing statute of limitations. We understand that is not your intent and we hope you will clarify this point. Efforts by the trustees to apply the statute retroactively for NRD are bad enough, double retroactivity by reviving stale claims is doubly bad.

A third technical issue is that there are a number of positive provisions in the chairman's mark which are then undermined by saying the provisions are requirements only "to the extent practicable." We think the "to the extent practicable" language should be deleted. Why, for example, should trustees use the best available scientific information only "to the extent practicable." Or why should trustees use site specific analyses to determine the extent of injury at a site only "to the extent practicable."

Finally, the requirement for the designation of a lead Federal trustee is positive but your language is subject to interpretation at sites involving Federal, state and tribal trustees. One interpretation of your language is that the Federal trustee will be the lead trustee at every site, even sites principally involving state or tribal resources. We believe that would not be the right result.

Mr. Chairman, I appreciate the opportunity you have given the Coalition for NRD Reform to testify before you today and I would be pleased to answer any questions you might have.

Thank you for this opportunity to testify.

APPENDIX 1

MEMBERS OF THE COALITION FOR NRD REFORM

ALCOA
ARCO
General Electric Company
Zeneca, Inc.
ASARCO
FMC
Kennebecott

American Petroleum Institute
 Reynolds Metals Co.
 Fort Howard Corporation
 Georgia-Pacific Corporation
 Hercules
 Elf Atochem
 USX Corporation
 Mobil
 American Forest and Paper Association
 Montrose Chemical Corporation
 National Paint & Coatings Association
 Beazer East, Inc.
 Dow Chemical Co.
 National Mining Association
 Amoco Corporation
 Western Regional Council

RESPONSES TO QUESTIONS SUBMITTED BY SENATOR DANIEL PATRICK MOYNIHAN TO
 GEORGE J. MANNINA, JR., TO SUPPLEMENT SEPTEMBER 4, 1997 HEARING RECORD.

Question 1. You mention in your testimony that natural resources can recover on their own—essentially, you suggest that we can wait for a “natural recovery” rather than trying to speed the process of recovery through restoration. How long, sir, are you prepared to wait for such “natural recovery” to occur?

Answer. Although my testimony does not mention natural recovery, your question is an important one. The facts are that once cleanup is completed, the environment will begin to recover and many resources will recovery naturally. In such circumstances, the question becomes how much money should be spent to accelerate the recovery process.

To simplify the analysis, assume that a resource can recover naturally in 15 years, but also can recover in 10 years with the expenditure of \$5 million or in 2 years with an expenditure of \$10 million. If all three restoration alternatives achieve the same result, the question becomes which alternative should be selected. Without more information, it is not possible to make that decision. The needed information relates to the purpose of the NRD program which is to restore what the public lost. If the affected resource has a very high public use, it may be appropriate to select the more expensive option in order to accelerate restoration. If the resource has a lower public use, then a slower restoration alternative might be appropriate.

The Coalition for NRD Reform has never advocated that we should always wait for natural recovery. Rather, we have recommended that natural recovery be considered as an option but that restoration should be timely. This means there must be careful consideration of the loss to the public. Often, this will argue against natural recovery and for accelerated restoration.

When considering accelerated restoration alternatives versus natural recovery, it is also important to recognize that accelerated restoration options may create unintended problems. For example, scientists have long recognized that in certain circumstances it may be appropriate to allow natural forces to cover over contaminated sediments rather than dredge such sediments. The reason is that the act of dredging releases otherwise trapped contaminants into the water column causing adverse environmental consequences.

Question 2. Is it your view that there are no non-use values associated with natural resources? If so, is the habitat of an endangered species worthy of protection?

Answer. The purpose of the NRD program is to restore, replace, or acquire the equivalent of the injured resource. Unfortunately, trustees have expanded the program to collect money that is surplus to the actual costs of restoration. Non-use damages fall into that category. If the resource is fully restored, what is the additional non-use money used for? The answer became clear in a Senate stakeholders meeting when trustees responded by stating that they would use non-use funds to address other environmental issues. The point is that non-use values are surplus to the cost of restoration.

With respect to your specific example of endangered species, if a release caused an injury to an endangered species, the Coalition for NRD Reform would support necessary restoration actions. If the impact on the endangered species was occurring because of impacts to the habitat, then habitat restoration measures would clearly be appropriate. However, claims for “non-use values” are surplus to the cost of actual restoration. In fact, any non-use values which may attach to endangered species are satisfied once the resource is restored.

Question 3. How do you feel we should address natural resource damages like those associated with the contamination of the Hudson and St. Lawrence Rivers?

Answer. The question assumes incorrectly that the trustees have established that there are natural resource damages associated with the Hudson and Saint Lawrence Rivers. To date, the trustees for both rivers have completed only the preassessment screen, the first step in determining whether there are any compensable injuries (i.e., actual adverse effects) to natural resources. It remains to be seen what natural resource damages (i.e., the cost of restoring, replacing, or acquiring the equivalent of any injured natural resource plus reasonable assessment costs) if any, are associated with any such injuries to natural resources of the Hudson and St. Lawrence Rivers.

With respect to the Hudson, the General Electric Company (GE) has spent more than \$130 million on PCB research and cleanup at its two plant sites and the River. In 1976, GE settled a claim by New York for PCB damage to the River to the full satisfaction of the State. The Natural Resources Defense Council, the Hudson River Fisherman's Association and the Sloop Clearwater were parties to the settlement. The State also received \$20 million from the Federal Government to address PCB contamination in the River, but did not take any action using those funds. In 1984, EPA concluded that no action other than natural recovery and the capping of exposed areas near GE's plant sites was appropriate at that time to address PCBs in the River. GE performed the capping pursuant to an agreement with EPA. In 1990, EPA began a reassessment of the River under Superfund, which will not be complete for at least another two years. GE has cooperated fully with that effort. In addition, GE settled the claims of the commercial fisherman for PCB damage.

We also note that there have been no restrictions on swimming, boating, or other recreational use of the Hudson or on its use as a drinking water supply because of PCBs. In a 1993 report entitled "20-year trends in Water Quality of Rivers and Streams in New York State, Based on Macroinvertebrate Data 1972-1992," the New York Department of Conservation (DEC) classified the seventy miles of the Hudson lying between Hudson Falls and Fort Edward and the City of Hudson as non-impacted or slightly impacted, reflecting "excellent" water quality and "good" water quality. The DEC, which was well aware of the PCBs in the river, concluded, "No impact at the community level has been observed at any site that can be attributed to high PCB levels." Fish are abundant and healthy in the Hudson." In 1995, the DEC described the upper River as supporting "robust populations of prized gamefish, largemouth bass, smallmouth bass, walleye, northern pike and striped bass of excellent size and quality [that] will draw recreational anglers from much of eastern New York." As to birds, the Fish and Wildlife Service study of tree swallows cited in the preassessment screen does not show or claim any reduction in the abundance of tree swallows or other birds found along the Hudson. After a hundred years, eagles have returned and hatched on the lower Hudson. Obviously, if eagles have not been present in the Hudson Valley for 100 years, something other than PCBs was the cause. Claims that there are significant natural resource damages associated with the Hudson River ignore these facts and other evidence of the robust health of the River.

To the extent that there are any compensable natural resource injuries associated with contamination of the Hudson and St. Lawrence Rivers that may give rise to damages, such injuries can be addressed effectively and responsibly by implementing a natural resource damages program as proposed by the Coalition for NRD Reform and detailed in the attached chart. Under that proposal, which is based in large part on the statute and the Department of the Interior's Type B damage assessment regulations, the trustees must first determine, using scientifically valid, site-specific assessment methods, that a release of hazardous substances has caused a natural resource injury. If the trustees determine that a release has injured a natural resource, the trustees next would determine whether the injured natural resource was committed to public use at the time of the conduct giving rise to the release. If the resource was so committed, then the trustees would determine whether the services provided to the public by the resource have been eliminated or impaired. If the services have been eliminated or impaired, the trustees then would develop and select a technically practicable, cost-effective and cost-reasonable plan for restoring those services in as timely a manner as is consistent with those criteria. Trustees would not be permitted to assert claims for non-use damages or past lost use damages, which are surplus to the cost of restoration. This approach would move the focus of the natural resource damages program away from maximizing damages claims to restoring what the public has lost as a result of an injury to a natural resource.

CRS REPORT—SUPERFUND: SUMMARY OF THE DRAFT CHAIRMAN'S MARK OF S. 8, THE SUPERFUND CLEANUP ACCELERATION ACT OF 1997; PREPARED AT THE REQUEST OF THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS—SEPTEMBER 2, 1997 (BY MARK REISCH, MARK HOLT, JAMES E. MCCARTHY, LINDA SCHIEROW, MARY TIEMANN, ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION)

SUMMARY

The Superfund Cleanup Acceleration Act, S. 8, was introduced on January 21, 1997, by Senator Bob Smith. It proposes extensive changes to the Superfund law, and would reauthorize it for 5 years at a level of \$8.5 billion.

Title I (Brownfields Revitalization) authorizes \$65 million per year for programs to characterize brownfields, to capitalize revolving loan funds for their cleanup, and to promote state voluntary cleanups. The Federal Government may not intervene at a site subject to a state remedial action plan unless there are certain specified risks present. Liability protection is given to neighbors of a Superfund site, and to innocent purchasers of contaminated property.

Title II (State Role) allows a state to receive authorization, or full or partial delegation of Superfund authorities at sites in the state. The state may ask EPA to remove cleaned sites from the National Priorities List (NPL). The 50 percent state cost-share requirement is reduced to 10 percent, or a percentage determined by the Office of Management and Budget.

Title III (Local Community Participation) authorizes the establishment of Community Action Groups to be conduits of information, and to represent the people during cleanup planning and implementation. The funds-matching requirement for Technical Assistance Grants to communities would be eliminated; early disbursements would be allowed.

Title IV (Selection of Remedial Actions) requires cleanups to be cost-effective and protective of human health and the environment. Remedies must be based on site-specific conditions and future use. It generally replaces the law's preference for permanent treatment remedies with specified factors, and establishes remedy review boards to reexamine remedy decisions.

Title V (Liability) exempts waste generators and transporters at co-disposal landfills for their liability for activities prior to January 1, 1997. Co-disposal landfills are those that mostly received municipal solid waste and sewage sludge. The liability of owners and operators (O/O) is capped at varying amounts depending on whether the O/O is private or a municipality, and how large the municipality is. Small businesses and other small waste contributors are exempt from liability. The bill establishes an allocation process for dividing liability at multi-party sites.

Title VI (Federal Facilities) allows the cleanup of Federal facilities to be delegated to a state provided it uses the Federal remedy selection process and standards. Federal facilities may be used to test innovative technologies.

Title VII (Natural Resource Damages) eliminates non-use damages, and claims for lost-use activities for pre-1980 activities. Title VIII limits the number of sites that can be added to the NPL, and doubles the emergency response authority to \$4 million and 2 years. Title IX authorizes \$8.5 billion for 5 years.

SUPERFUND: SUMMARY OF THE DRAFT CHAIRMAN'S MARK OF S. 8, THE SUPERFUND CLEANUP ACCELERATION ACT OF 1997

The Superfund Cleanup Acceleration Act of 1997, S. 8, was introduced on January 21, 1997, by Senator Bob Smith, Chairman of the Environment and Public Works Subcommittee on Superfund, Waste Control, and Risk Assessment. The bill reauthorizes the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or Superfund) for 5 years at a level of \$8.5 billion total, and makes extensive amendments in its nine titles. The subcommittee has received comments on the bill since its introduction, and has negotiated changes with Senators and the Administration. The draft chairman's mark circulated by the subcommittee in late August is the result of those discussions and is summarized in this report. A hearing on the revised bill is scheduled for September 4, 1997, and markup is planned for September 11.

TITLE I—BROWNFIELDS REVITALIZATION

There is no specific brownfields authority in CERCLA; the current program was initiated administratively by EPA. It provides 2-year grants of up to \$100,000 annually (\$200,000 total) to help communities address brownfields, which are abandoned, idle, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. The

grants are for site assessment and related activities—not cleanups. The Taxpayer Relief Act of 1997 (P.L. 105–34) allows brownfield cleanup costs to be deducted in the current year, a tax break estimated at \$417 million by the Joint Committee on Taxation, that ends December 31, 2000.

S.8 directs EPA to establish two programs. The first, the Brownfield Characterization Grant Program, would provide grants of up to \$100,000 per year for 2 years to characterize and assess brownfield sites; \$15 million annually is authorized for the program for 5 years. “Eligible entities” to receive the grants are local governments, regional councils, state-chartered redevelopment agencies, and Indian tribes.

The second program, the Brownfield Remediation Grant Program, would provide grants to states or eligible entities to capitalize revolving loan funds (RLF) for brownfield cleanups. A state receiving a grant must pay a matching share of at least 50 percent of the costs of the response action for which the grant is made, from other sources of state funding. The maximum amount of a grant with respect to any facility may not exceed \$150,000 annually for 2 years. Twenty-five million dollars annually is authorized for the program for 5 years. An eligible entity receiving a grant for either program may leverage the funds by using them at a brownfield project for which funding is received from other sources, but the grant may only be used for the purpose specified (site characterization or capitalizing the RLF).

Requirements for grant applications are set out, as are criteria for EPA to use in ranking the applications. Facilities being cleaned up under other authorities are excluded from the program, namely:

- facilities subject to emergency removal actions under CERCLA,
- facilities on the National Priorities List (NPL),
- facilities subject to corrective action under RCRA,¹
- facilities being closed under RCRA,
- facilities subject to administrative orders or consent decrees,
- Federal facilities, and
- facilities for which cleanup assistance has been provided under the Leaking Underground Storage Tank (LUST) Trust Fund.

The bill also authorizes technical and financial assistance to states to maintain, establish, and administer voluntary response programs. Elements of a qualifying state program include public participation in remedy selection, streamlined procedures, oversight and enforcement authorities to ensure that response activities are completed, and a requirement for state certification that the response is complete. A voluntary cleanup at an NPL site must protect human health and the environment to the same extent as a remedial action selected by EPA. The bill authorizes \$25 million per year for 5 years for assistance to states. Each qualifying state program is guaranteed at least \$250,000 per year.

EPA must notify a state prior to undertaking an administrative or judicial enforcement action at a facility² where there is a release or threatened release of a hazardous substance. The state must notify EPA within 48 hours whether the facility is currently, or has been, subject to state remedial action. The Federal Government is forbidden from taking an administrative or judicial enforcement action, or bringing a private civil action against anyone at a facility subject to a state remedial action plan. There are several exceptions to this prohibition. EPA may bring an administrative or judicial enforcement action if:

- the state requests assistance; or
- EPA makes a written determination that the state is unwilling or unable to take appropriate action, after giving the governor notice and an opportunity to cure; and (1) the Agency for Toxic Substance and Disease Registry issues a human health advisory, or (2) EPA determines there is an imminent threat; or
- EPA determines the contamination has migrated across a state line; or
- EPA obtains a declaratory judgment in U.S. district court based on: newly discovered information about the contamination; the discovery of fraud; a failure of the remedy; or a change in land use that presents a clear threat of exposure to hazardous substances.

At a facility *not* subject to a state remedial action plan, the President shall provide notice to the state within 48 hours after issuing a section 106(a) administrative order.³ The order shall cease to have effect 90 days after issuance unless the state concurs in the continuation of the order.

¹Resource Conservation and Recovery Act, also known as the Solid Waste Disposal Act.

²This provision and the rest of this section describing title I applies to any applicable facilities, not just brownfields.

³A section 106(a) administrative order is a unilateral administrative order whereby EPA can order a potentially responsible party (PRP) to perform certain remedial actions at a Superfund

The bill protects from liability landholders whose property may be contaminated by a contiguous NPL site, if they did not contribute to the contamination; such landholders shall provide cooperation and facility access to those cleaning up the property. Also relieved from liability are purchasers of contaminated property, if they did not contribute to the contamination, and conducted appropriate inquiries prior to the purchase. "Appropriate inquiries" is clarified.

TITLE II—STATE ROLE

At present, states are involved in the selection of remedies and may enter into cooperative agreements with EPA to carry out most cleanup activities on a site-by-site basis. However, final remedy selection must be done by EPA.

The bill defines several terms for use in this title, including:

- "Authorized state" means a state that is authorized to apply its own cleanup program requirements, in lieu of the requirements of CERCLA, to the cleanup of a non-Federal listed facility.
- "Delegable authority" means the authority to perform all the elements in one or more of the following categories of authority:
 - (1) site investigations, evaluations, and risk analyses;
 - (2) development of alternative remedies, and remedy selection;
 - (3) remedial design and remedial action;
 - (4) operation and maintenance; and
 - (5) information collection, and allocation of liability.
- "Delegated state" means a state that has received delegable authority. Delegation allows a state to implement the Federal CERCLA program.
- "Delegated facility" means a non-Federal listed facility with respect to which a delegable authority has been delegated to a state.
- "Non-Federal listed facility" means a facility not owned by any entity of the U.S. Government, and that is on the National Priorities List (NPL).
- "Enforcement authority" means all authorities necessary to recover response costs, to require Potentially Responsible Parties (PRPs) to perform response actions, and otherwise to compel implementation of a response action, including: issuance of a section 106(a) administrative order, a response action cost recovery, imposition of a civil penalty or award, settlement, and information gathering.
- "Non-delegable authority" means authority: (1) to make grants to Community Advisory Groups; and (2) to conduct research and development under CERCLA's provisions.

The bill directs EPA "to seek . . . to transfer" to states the responsibility to perform response actions (cleanups) at non-Federal listed facilities. There are four ways to accomplish the transfer of responsibility: by authorization, expedited authorization, delegation, and limited delegation. Authorization allows a state to implement its own program within its borders. Delegation allows a state to implement the Federal program.

- *Authorization.* EPA may authorize a state to apply any or all of the requirements of the state's cleanup program in lieu of CERCLA to any non-Federal listed facility if the state: (1) has adequate legal authority, financial and personnel resources, organization, and expertise; (2) will implement its cleanup program in a manner protective of health and the environment; (3) has procedures for public notice and an opportunity to comment; and (4) agrees to use its enforcement authority to require potentially responsible parties (PRPs) to perform and pay for the response actions. EPA must determine within 180 days whether the state meets the requirements, or the transfer of responsibility to the state is deemed to have been granted.

- *Expedited Authorization.* A state that meets any three of the following five criteria may receive expedited authorization to operate its program in lieu of the Federal program: (1) the state's program has been in effect for at least 10 years; (2) the state has spent at least \$10 million from its state cleanup fund or other state source of cleanup funding; (3) the cleanup program has at least 100 employees; (4) at least 200 response actions have been performed at non-NPL sites under the program; and (5) there are at least 100 non-Federal listed facilities in the state, or 6 non-Federal listed facilities per million state residents. EPA has 90 days to review the state's certification, after which the transfer of responsibility to the state is deemed to have been granted.

- *Delegation.* A state may apply to receive one or more delegable authorities for one or more non-Federal listed facilities. The state must demonstrate that its en-

site if there is an imminent and substantial endangerment to public health, welfare, or the environment; failure to comply with a section 106 order is subject to a fine of not more than \$25,000 per day.

forcement authorities are equivalent to those under CERCLA. Its application must identify each delegable authority it requests for each non-Federal listed facility for which it requests delegation. The application must also enable EPA to determine whether and to what extent: (1) the state has adequate financial and personnel resources, organization, and expertise; (2) the state will implement the delegated authorities in a manner protective of health and the environment; and (3) the state agrees to require PRPs to perform and pay for the response actions. EPA must approve or disapprove the application within 120 days or the application is deemed to have been granted.

- *Limited Delegation.* EPA may delegate to a state limited authority to perform, ensure the performance of, supervise, or otherwise participate in the performance of one or more delegable authorities, as appropriate.

A state shall have sole authority to perform the transferred responsibility. A delegated state shall implement the applicable provisions of CERCLA (including regulations and guidance issued by EPA) in the same manner as EPA at facilities that are not delegated.

EPA may withdraw the transfer of responsibility if it finds that a state does not meet the requirements that it has certified or agreed to.

Before EPA performs an emergency removal at a non-Federal listed facility under section 104 it must notify the state. If the state notifies EPA within 48 hours that it intends to take action, EPA shall not proceed unless the state fails to act within a reasonable period of time. In case of a public health or environmental emergency, EPA need not provide notice prior to acting.

If there is a hazardous substance release at a non-Federal listed facility where responsibility has been transferred to the state, the Federal Government may not take an administrative or judicial enforcement action, or bring a private civil action, unless the state requests assistance, or EPA obtains a declaratory judgment in U.S. district court that the state has failed to make reasonable progress and there is an imminent threat of exposure to hazardous substances.

Of the amount of any response costs recovered from a responsible party by a state that has received transferred responsibility for a non-Federal listed facility, the state may retain: (1) 25 percent of any Federal response costs incurred there, plus (2) any response costs incurred by the state at the facility; the remainder shall be deposited in the Superfund trust fund. EPA may recover response costs from a PRP if the state says it does not intend to, or the state fails to take timely action in light of applicable statutes of limitation. If EPA takes a cost recovery action against a PRP, the state may not take any other action for recovery of response costs relating to that release.

A state may request EPA to remove all or part of a transferred facility from the NPL, and EPA shall do so if the delisting is not inconsistent with a requirement of CERCLA. The agency shall report annually to Congress describing actions taken under this provision. Facility-specific and non-facility-specific grants to delegated states are provided for. Grant money may not be used to pay the state share of response costs. The 50 percent state cost-share requirement at state-operated facilities would be repealed. The state cost share would be the lower of 10 percent, or a percentage determined by the Office of Management and Budget.

TITLE III—LOCAL COMMUNITY PARTICIPATION

Currently, CERCLA requires only that there be a public notice and comment period before the adoption of many emergency removal actions and all remedial (cleanup) actions. Technical assistance grants (TAGs) of \$50,000 are available to the public.

Title III would facilitate participation in decisionmaking by the people affected by sites that are on or proposed for the National Priorities List (NPL), or where there is a removal action expected to last more than a year or that will cost more than the amount specified in section 104(c)(1). EPA would be required to inform and consult with the affected community and to consider their views in developing and implementing the remedial action plan. The affected community would have access to documents regarding response actions, but not to those relating to liability nor confidential documents.

S. 8 directs EPA to assist in establishing Community Advisory Groups (CAGs). A CAG shall contain 20 or fewer EPA-approved voting members representing the affected community, including residents or property owners; other affected citizens; the local medical community; local Indian communities; citizen, civic, environmental, or public interest groups; local businesses; and employees at the facility. When appropriate, CAGs will include as non-voting members representatives of

EPA, other Federal agencies, states, Indian tribes, local governments, facility owners, and potentially responsible parties.

CAGs would serve as conduits of information to and from the community, and represent it during the remedial action planning and implementation process. CAGs may be recipients of technical assistance grants (TAGs) to obtain expert assistance in interpreting information or for training in community involvement. No more than 10 percent of a grant could be used to train citizens. As in current law, TAGs are for \$50,000, but the bill allows a waiver of that limit. The bill eliminates the current law fund-matching requirement, and authorizes early disbursement to the TAG recipient in advance of the recipient's making expenditures to be covered by the grant; up to \$5,000 may be advanced at a time.

TITLE IV—SELECTION OF REMEDIAL ACTIONS

Under CERCLA, cleanup standards are set by looking at applicable or relevant and appropriate requirements (ARARs) of Federal and state laws. Where no ARARs exist, cleanup levels are determined using site-specific risk assessments. The law states a preference for remedies using treatment (of soil and groundwater) that permanently reduces or eliminates volume, toxicity, and mobility of contaminants.

Section 401 adds two definitions to CERCLA section 101. The first new definition, "technically impracticable," means impracticable due to engineering infeasibility or unreliability or inordinate costs. The second added definition, "beneficial use," means the use of land on completion of a response action in a manner that confers economic, social, environmental, conservation, or aesthetic benefit.

Mandate to Protect Human Health and the Environment. Section 402 requires the President to select a cost-effective remedial action that achieves the mandate to protect human health and the environment, and that complies with other applicable Federal and state laws. The bill states that, notwithstanding any other provision of this Act, a remedial action shall protect human health. The remedial action is deemed to protect human health if, considering the expected exposures associated with the current or reasonable anticipated future land and water use, and on the basis of a facility-specific risk evaluation, the remedial action: (1) achieves a residual risk from exposure to threshold carcinogenic hazardous substances such that the cumulative lifetime additional cancer risk is in the range of 10^{-4} to 10^{-6} (one in 10,000 to one in 1,000,000) for the affected population; (2) achieves a residual risk from exposure from nonthreshold carcinogenic and noncarcinogenic hazardous substances that does not exceed a hazard index of 1; and (3) prevents or eliminates any human ingestion of drinking water containing hazardous substances in excess of Safe Drinking Water Act maximum contaminant levels (MCLs), or if MCLs have not been established for the substance, at levels that meet the goals for protecting human health.

Stated another way, the remedial action will "protect human health" if the remaining chemicals at the site are: (1) at levels unlikely to cause more than one case of cancer in a population of between 10,000 and 1,000,000 people who are exposed all their lives; and (2) below levels expected to cause any other adverse health effects in any people exposed.⁴

The remedial action for a facility is deemed to protect the environment if it protects plants and animals from significant impacts resulting from releases of hazardous substances at the facility. The determination of what is protective would not be based on individual plants and animals unless the species is listed as threatened or endangered under the Endangered Species Act.

A remedy must comply with the substantive requirements of Federal and state environmental and facility-siting laws applicable to the conduct of the remedial action or to the determination of the cleanup level. More stringent state requirements may be applied at NPL sites if the state demonstrates that they are generally applicable and consistently applied to remedial actions, and the state publishes and identifies the applicable requirements to the President. Federal hazardous waste management provisions of the Solid Waste Disposal Act (Section 3004) do not apply to the return of "contaminated media into the same media in . . . then-existing areas of contamination at the facility." Federal and state procedural requirements, including permitting requirements, shall not apply to response actions conducted on site at the facility. Waivers from the substantive requirements of Federal and state environmental and facility siting laws are authorized for specified reasons; however, the

⁴The intent is to ensure that exposure to hazardous substances is small enough that adverse health effects are either: precluded (for threshold substances that are known to be harmless at low exposure levels); or highly unlikely (for nonthreshold hazardous substances that have no known level of harmless exposure, such as many carcinogens).

President must publish findings including documentation and an explanation of how the remedial action meets the cleanup requirements of Section 121.

If no applicable Federal or state standard exists for a contaminant, a remedial action must meet a standard that the President determines to be protective.

Remedy Selection Methodology. The President shall select a remedial action from among a range of alternatives by following remedy selection rules and balancing adequately the following factors:

- effectiveness of the remedy in protecting health and the environment;
- reliability in achieving the protectiveness standard over the long term (replacing the current law's preference for permanence);
- short-term risk posed by implementing the remedial action;
- acceptability to the community;
- implementability; and
- reasonableness of the cost.

A remedial action that implements a presumptive remedial action is considered to achieve the goals to protect human health and the environment, balance the above factors, and account for remedy selection rules.⁵

Remedy Selection Rules. In selecting a remedy for a facility, the President shall take into account the reasonably anticipated future use of land and water potentially affected by the release. In developing assumptions regarding reasonably anticipated future land uses, the President must consider the views of local officials and community members and consider specified factors. In developing assumptions regarding reasonably anticipated future groundwater and surface water uses, the President must give substantial deference to classifications in a state comprehensive groundwater protection program and consider other designations or plans adopted by the governmental unit that regulates surface or groundwater use planning in the area. The information on which the President bases the development of these assumptions must be included in the administrative record.

If appropriate, a remedial action for contaminated groundwater may proceed in phases, allowing collection of sufficient data to evaluate other actions at the site, and to determine the appropriate scope of the remedial action. Groundwater decisions must take into consideration current or reasonably anticipated future use of the groundwater, any natural attenuation that would occur without action, and the effect of any other response actions. A remedial action shall seek to protect uncontaminated groundwater that is suitable for use as drinking water for such beneficial use unless it is technically impracticable to do so. For contaminated groundwater that is, or is planned to be, used for drinking, if it is technically practicable, the President shall try to restore it to a condition suitable for beneficial use. In determining technical practicability and timeframe for restoring groundwater, the President may distinguish among groundwater contamination zones at a site.

For contaminated groundwater that is suitable for drinking water, a remedial action must, if technically practicable, attain in the contaminated groundwater plume and extending to the edge of any contaminant that will be managed in place, either Federal drinking water standards or state water quality standards for water designated for drinking water use, whichever is more stringent. If no standard exists, then the remedy must attain a level that is protective of human health and the environment. If restoration is technically impracticable, the selected remedy may rely on point-of-use treatment or other measures to ensure there is no ingestion of contaminated drinking water; point-of-use treatment shall be considered as part of the remedy's operation and maintenance.

For groundwater not suitable for drinking water, a remedy must, if technically practicable, attain a standard that is protective of the current or future uses of the water and any connected surface water.

Groundwater shall not be considered suitable for drinking water if naturally occurring conditions prevent it, or it is so contaminated by broad-scale human activity (unrelated to a facility release) that restoration is technically impracticable, or if it is physically incapable of yielding 150 gallons a day to a well or spring (unless it is currently used as drinking water).

For discrete areas containing highly toxic contaminants that cannot be reliably contained or are highly mobile, and present a substantial risk to human health and the environment, the remedy selection process shall include a preference for a remedy that includes treatment. For such areas, the President may select a final containment remedy at a landfill or mining site in specified circumstances.

⁵Presumptive remedies are preferred technologies for common categories of sites, based on historical patterns of remedy selection and EPA's scientific and engineering evaluation of performance data on technology implementation.

The Administrator may not select a remedy that allows a contaminant to remain at a facility above a protective level unless institutional and engineering controls are incorporated into the remedial action that ensure protection of human health and the environment. Institutional controls are defined to mean restrictions of the permissible use of land, groundwater or surface water included in any enforceable decision document for a NPL facility to comply with the requirements to protect human health and the environment. A remedial action that uses institutional and engineering controls shall be considered to be on an equal basis with all other remedial action alternatives. EPA is required to maintain a registry of institutional controls that place restrictions on land, water, or other resources uses; and that are included in an enforceable decision document.

If, after reviewing a remedy, the President finds that attaining a standard is technically impracticable, the President shall select a technically practicable remedy that protects public health and most closely achieves the cleanup goals through cost-effective means.

Facility-Specific Risk Evaluations. Section 403 states that the goal of a facility-specific risk evaluation is to provide informative estimates that neither minimize nor exaggerate the current or potential risk posed by a facility.

A facility-specific risk evaluation shall: (1) use chemical and facility-specific data in preference to default assumptions whenever practicable or, if this is not practicable, use a range and distribution of realistic and scientifically supportable default assumptions; (2) ensure that the exposed populations and all pathways are accurately evaluated; (3) consider current and anticipated future use of land and water resources in estimating exposure; and (4) consider the use of institutional controls. The President may consider only institutional controls that are in place at the facility when the risk assessment is conducted.

This section directs that facility-specific risk evaluations be used to: determine the need for remedial action evaluate the current and potential exposures and risks at the facility; screen out contaminants, areas or exposure pathways from further study; evaluate the protectiveness of alternative proposed remedies; demonstrate that the selected remedial action can achieve the goals of protecting health and the environment and land and water resource uses; and establish protective concentration levels if no applicable requirement exists or if an applicable requirement is not sufficiently protective.

The President must ensure that the presentation of health effects information is informative, comprehensive and understandable. The document reporting the results of the risk evaluation must specify each population addressed by the risk estimates, present the central estimate of risk for specific populations and the upper- and lower-bound risk estimate, identify uncertainties in the assessment process, and known peer-reviewed studies that do or do not support the health effects estimates and the methodology used to reconcile inconsistencies in the data. In preparing facility-specific risk evaluations, the President must use the best available peer-reviewed science and studies, and data collected by accepted methods. Within 18 months of enactment, the President must promulgate a regulation implementing this section.

Presumptive Remedial Actions. For the purpose of streamlining the remedial action selection process, Section 404 directs EPA to establish presumptive remedial actions that: identify preferred technologies and approaches for common categories of facilities, and identify site characterization methodologies for those categories of facilities. Such presumptive remedies may include institutional and engineering controls. They must be practicable, cost-effective, and protective of human health and the environment. Within one year, EPA must issue a list of presumptive remedial actions that are available for specific categories of facilities. At least once every three years, EPA must solicit information for updating the presumptive remedial actions to incorporate new technologies or to designate additional categories of facilities.

Section 404 directs the President to expedite implementation of response actions and reduce transaction costs. This is to be achieved by implementing measures to accelerate and improve the remedy selection and implementation processes, tailor the level of oversight of response actions, and streamline the process for submitting, reviewing and approving plans and other documents. The President must attempt to expedite completion of response actions through appropriate phasing of investigative and response activities. The results of initial investigations shall be used, as appropriate, to focus subsequent data collection or to develop multiple phases of a response action.

The bill authorizes the President to allow a potentially responsible party (PRP) or group of PRPs to perform a response action where the President determines that the party(ies) will perform the action properly and promptly and the PRPs agree to

reimburse the Fund for oversight costs. The President may tailor the level of oversight of PRP-led response actions taking into consideration specified factors.

The bill requires EPA to issue guidelines identifying the contents of a draft proposed remedial action plan which must include a discussion of alternative remedies and their costs, a recommended remedy, and a summary of information used to make the recommendation including a brief description of site risks.

Remedy Review Boards. EPA must establish at least one remedy review board comprised of technical and policy experts from Federal and state agencies. Within 180 days of enactment, EPA must promulgate a regulation establishing procedures for the operation of the review board including cost-based or other criteria for determining which draft proposed remedial action plan will be eligible for review. EPA may develop different criteria for different categories of facilities. The criteria shall, to the extent practical, allow for the review of not less than an annual average of one-third of the draft proposed remedial action plans. A proposed remedial action plan that meets the criteria shall be submitted to the board unless EPA determines that review by the board would unacceptably delay measures to protect human health and the environment. The Administrator shall give substantial weight to the board's recommendations in determining whether to modify a remedial action plan. The President may approve a draft proposed remedial action plan prepared by a PRP.

Delisting NPL Sites. Section 405 sets procedures and timeframes for EPA to provide notice of completion of a remedial action and delisting of a facility from the NPL. Delisting does not affect liability allocations, cost-recovery provisions, or operation and maintenance obligations. A PRP is released from liability if the facility is available for unrestricted use, and operation and maintenance are not needed. If the facility is not available for unrestricted use, or operation and maintenance are required, EPA must review the status of the facility every 5 years and require additional remedial action, as needed. A facility or portion of a facility may be made available for restricted use.

Transition rules for remedy review. Section 406 establishes transition rules for facilities currently involved in remedy selection. EPA is directed to use the remedy review boards to determine, on petition by the implementor of a record of decision (ROD), whether an alternative remedy should apply to a facility, rather than the one specified in the ROD.

For facilities for which a record of decision (ROD) was signed before the date of enactment and that meet specified criteria, the implementor of the ROD has one year to submit to the remedy review board a petition to update the ROD to incorporate alternative technologies or approaches in the remedial action. To be eligible for review, the implementor must demonstrate that the alternative proposed remedial action meets the cleanup requirements of Section 121, the Governor does not object to consideration of the petition, the ROD was issued before certain dates, and the ROD has implementation costs in excess of \$30 million (or the cost is between \$5 million and \$30 million, and the alternative remedy achieves at least a 50 percent cost savings). The review board must prioritize decisions to accept petitions for remedy update based on the above criteria and the potential for cost savings. In forming recommendations for remedy updates, the review board must consider the continued relevance of the exposure and risk assumptions in the original remedy, the effectiveness of the original cleanup strategy, cleanup goals, new technologies and approaches, the level of community and PRP involvement and consensus in selecting the original strategy, and other factors. The board must submit its recommendations to EPA within 180 days of receiving a petition. In deciding whether to approve a proposed remedy update, EPA is to give substantial weight to the board's recommendations. EPA must submit an annual report to Congress on the Agency's activity in reviewing and modifying RODs signed before the date of enactment of this section. In conducting remedial action reviews, EPA should give priority consideration to RODs that were issued before October 1, 1993, and that involve primarily groundwater treatment for dense, nonaqueous phase liquids.

National Priorities List. When listing a site on the NPL, EPA should not include, to the extent practicable, any parcel of real property at which no release has occurred, but to which a released contaminant has migrated in groundwater unless the groundwater is (or was) in use as a public drinking water supply, and the facility owner or operator is liable for any response costs.

TITLE V—LIABILITY

Current law imposes joint and several liability on a strict and retroactive basis, covering owners and operators of sites, generators and transporters of hazardous substances released at Superfund sites, and those who arranged for disposal at

those sites. It authorizes EPA to settle with PRPs, provides authority for EPA to prepare non-binding allocations of responsibility, and has special settlement provisions for *de minimis* parties. EPA may use mixed funding, and may provide settling parties protection from third party lawsuits and covenants not to sue.

The bill defines “codisposal landfills”, “municipal solid waste”, “municipality”, and “sewage sludge”. A codisposal landfill is one that was listed on the NPL as of January 1, 1997; received municipal solid waste or sewage sludge (MSW or SS); and also may have received, before the effective date of RCRA subtitle C requirements,⁶ hazardous waste, if the landfill contains predominantly MSW or SS that was transported to the landfill from outside the facility.

Title V would exempt from liability for any response costs incurred after the date of enactment the generator, arranger, and transporter of MSW and SS. *De micromis* contributors are exempt from liability for response costs incurred after enactment unless the material contributed or may contribute significantly to the amount of response costs; a *de micromis* contribution is less than 200 pounds or 110 gallons of material containing a hazardous substance prior to January 1, 1997. Also exempt from liability is any small business with fewer than 30 employees, or less than \$3 million in annual gross revenues.

For generators, transporters, and arrangers there is no liability for response costs incurred after enactment for codisposal landfills. For the owners and operators of codisposal landfills, the situation is different, and depends on whether the owner or operator is private or a municipality, and if the latter, on its size.

Large and small municipalities are defined as those with populations above and below 100,000 respectively. For a codisposal landfill that is owned or operated only by small municipalities, and is not subject to RCRA subtitle D⁷ criteria, the aggregate liability of the municipalities for response costs incurred after enactment shall be the lesser of (a) 10 percent of the total response costs, or (b) the cost of complying with RCRA subtitle D (as if the facility had continued to accept MSW through January 1, 1997). For large municipalities, their aggregate liability would be the lesser of 20 percent of the total response costs, or the RCRA subtitle D compliance costs.

For codisposal landfills owned or operated by non-municipalities, and that are not subject to RCRA subtitle D, the liability would be the lesser of 40 percent of the total amount of response costs, or the costs of complying with RCRA subtitle D. For codisposal landfills owned or operated by a combination of small and large municipalities, or persons other than municipalities, and are subject to RCRA subtitle D, the allocator shall determine the proportion of the use of the landfill that was made by small and large municipalities and persons other than municipalities, and shall allocate among them an appropriate percentage of total liability not exceeding the aggregate liability percentages stated. For a codisposal landfill that is subject to RCRA subtitle D, regardless of the status of the owners and operators, the aggregate liability is no more than the costs of complying with RCRA subtitle D.

The codisposal landfill exemption does not apply to one who acted in violation of RCRA subtitle C or D if the violation pertains to a hazardous substance that caused the incurrence of response costs at the facility.

A responsible party who currently is subject to a section 106 administrative order or has entered into a settlement decree is required to fulfill his obligations, even if the responsible party is not liable by reason of a liability exemption or limitation. The party may apply to the Fund for contribution, and shall be reimbursed expeditiously.

The bill replaces the *de minimis* settlement provisions of section 122 with a provision establishing expedited settlement procedures for parties that contributed less than 1 percent of the volume of material containing a hazardous substance at an NPL site. It provides that any such settlement will be final if the settling party pays a premium of not to exceed 10 percent of the amount of the settlement.

The bill would establish a mandatory, non-binding allocation process for multi-party sites where response costs are incurred after enactment. Excluded from the allocation process are facilities where cost shares are already determined. The bill excludes from liability relief any party found guilty of violating Federal or state law resulting in the release of a hazardous substance which caused the incurring of response costs at the facility.

The bill sets a moratorium on litigation until 120 days after the allocator’s report is issued.

⁶ Subtitle C of the Resource Conservation and Recovery Act address the generation, handling, treatment, storage, and disposal of hazardous waste; for most purposes, its effective date was November 19, 1980.

⁷ RCRA subtitle D addresses non-hazardous wastes.

The bill would require that each allocation be performed by a neutral third-party allocator in a fair, efficient, and impartial manner. The allocator is to make every effort to streamline the process and minimize costs. Prior to issuing a final allocation report, the allocator shall give each party opportunity to comment on a draft. The actions of the allocator would not be subject to judicial review.

Within 90 days of enactment, the bill requires EPA to establish a process for the expedited selection and retention of a neutral allocator. The EPA Administrator or the Attorney General shall participate in the allocation process as the representative of the Fund from which any orphan share shall be paid. Allocators are authorized to acquire reasonable support services, and the Administrator may not limit the discretion of the allocator in the conduct of the allocation.

The Administrator begins the allocation process for a facility by performing a comprehensive search for all potentially responsible parties. The allocator is required to allow each of these parties at least 30 days to name additional potentially responsible parties and provide supporting information. These parties will be included on the list of allocation parties unless there is no basis to believe they are liable. Any party assigned a zero share in the allocator's final report, however, will be entitled to recover its costs of participating in the process, including attorney's fees, from the person who submitted its name.

The allocator is required to provide a written final allocation report to the Administrator and each allocation party specifying the percentage share of each party and any orphan shares. The allocator shall allow the parties 60 days to reach a voluntary settlement, and shall adopt any such settlement in lieu of issuing an allocation report if it allocates at least 95 percent of the recoverable costs of response action and contains the terms and conditions generally applicable to allocation settlements.

The allocator shall prepare a nonbinding allocation report that specifies the percentage share of each party, and any orphan share. The factors for allocation are:

- the amount, degree of toxicity, and mobility of hazardous substances contributed by each party;
- the degree of involvement of each party;
- the degree of care exercised with respect to hazardous substances;
- the cooperation of each party in contributing to any response action, and in providing complete and timely information to the allocator; and
- such other equitable factors as the allocator determines are appropriate.

The orphan share consists of: (1) the shares of insolvent or defunct parties; (2) the remainder of any share not paid by a party where: (i) it was an expedited settlement with a person with limited ability to pay; (ii) the party's share is eliminated, limited, or reduced by any provision of this Act; or (iii) the person settled with the U.S. before the allocation was completed. Unattributable shares will be distributed among the allocation parties and the orphan share in accordance with the allocated share assigned to each.

The allocator has information-gathering authorities, including the authority of the President under section 104(c) and authority to issue subpoenas. Information submitted to the allocator is to be kept confidential by all persons involved in the allocation and is not discoverable (if not independently discoverable or admissible) in judicial or administrative proceedings. The submission of information to the allocator does not constitute a waiver of any privilege under any Federal or state law.

The Administrator and the Attorney General may jointly reject a report by an allocator if they determine, not later than 180 days after the Administrator receives the report, that no rational interpretation of the facts would form a reasonable basis for the shares assigned to the parties, in light of the factors required to be considered, or that the allocation process was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct. If a report is rejected, the allocation parties shall select an allocator to perform a new allocation based, to the extent appropriate, on the record available to the previous allocator.

Unless a report is rejected, any party at a mandatory allocation facility shall be entitled to resolve its liability to the United States if it offers to settle on the share specified by the allocator within 90 days of issuance of the allocator's report. The terms of such settlements shall provide authority for the Administrator to require any allocation party or group of parties to perform the response action, and shall include i) a waiver of contribution rights against all potentially responsible parties; ii) a covenant not to sue and provisions regarding performance or adequate assurance of performance of the response action; iii) a premium not to exceed 10 percent to cover the risk of the United States not collecting unrecovered response costs; iv) complete protection from all claims for contribution; and v) provisions for prompt contribution from the Fund for any response costs incurred in excess of the party's allocated share.

The bill provides that an allocation party that incurs response costs after the date of enactment to an extent that exceeds its allocated share shall be entitled to prompt payment of the excess amount from the Fund, reduced by an amount not exceeding the litigation risk premium. The bill includes specific provisions concerning the timing of any such payment, failure to perform work, auditing of claims, and waiver of contribution rights from other responsible parties.

If funds are unavailable in any fiscal year to provide contribution to all eligible allocation parties, the Administrator may delay payment until funds are available. The priority for payment shall be based on the length of time that has passed since settlement. Delayed payments shall include interest on the unpaid balance at a rate equal to that of the current average market yield on outstanding marketable obligations of the United States with a maturity of 1 year.

If a party does not pay its allocation share within 120 days of the allocator's report, EPA may commence an action to recover response costs not recovered through settlements with other parties. Parties that do not pay their allocation share are subject to the joint, several, strict, and retroactive liability of section 107.

The cost of implementing the allocation process and the funding of orphan shares shall be considered necessary response costs under Superfund.

Response action contractors (RACs) would receive additional liability protection by being excluded from the definition of owners and operators, and by extending their existing exemption from Federal law to state law. RAC negligence would be evaluated based on the standards and practices in effect at the particular time and place. Subcontractors are also covered.

The liability of "501(c)(3) organizations" (religious, charitable, scientific and educational organizations) that receive a facility as a gift, would be limited to the fair market value of the facility. The bill relieves the liability of a railroad owner or operator of a spur track if he is not responsible for a release.

The bill provides an exemption from liability for those who arrange for the recycling of seven specified materials if they can meet certain threshold demonstrations. The seven materials are paper, plastic, glass, textiles, rubber (other than whole tires), metal, and batteries.

TITLE VI—FEDERAL FACILITIES

Current law makes Federal agencies subject to CERCLA in the same way as other parties. The agencies must pay for cleanup of their facilities out of their appropriations; they are not eligible to use any Superfund moneys. Cleanups of federally owned sites on the NPL are under the sole jurisdiction of Federal environmental laws; federally owned sites not on the NPL are subject to state law concerning removal, remedial action, and enforcement.

Title VI authorizes EPA to transfer responsibilities over federally owned NPL sites to qualified states. To receive authority over a site, a state must have an adequate environmental enforcement program, utilize CERCLA's remedy selection process and standards, and abide by the terms of any existing interagency agreement between EPA and the Federal agency that owns the site. The President may take enforcement action at such a transferred site if the state requests it, or if EPA obtains a declaratory judgment in U.S. district court that the state has failed to make reasonable progress and there is an imminent threat of exposure to hazardous substances.

A Federal officer, employee, or agent may not be held criminally liable for failing to comply with a state order to take a response action at a federally owned or operated site, unless: (1) he has not fully performed his duties to ensure that a sufficient request for funds to undertake the response action was included in the President's budget, or (2) appropriated funds were available to pay for the response action.

The President may designate Federal facilities on the NPL for research, development, and application of innovative technologies by Federal and state agencies, and public and private entities. EPA may approve or deny the use of any innovative technology at a Federal site.

TITLE VII—NATURAL RESOURCE DAMAGES

CERCLA makes the Federal and state governments trustees for natural resources; claims against responsible parties must be made within 3 years after the later of (1) discovery of the loss, or (2) the date on which regulations are promulgated.

The bill would limit the measure of damages for injury or loss of natural resources to the costs of restoration, replacement, or acquisition of equivalent natural resources, and the costs of assessing damages. The bill eliminates non-use damages, and claims for lost-use activities that occurred prior to December 11, 1980; there can

be no double recovery under both CERCLA and other law. Nor can there be recovery if the natural resource has returned to its baseline condition before the filing of a claim for natural resource damages, or the incurrence of assessment or restoration costs by a trustee.

The bill strikes the provision which gives a trustee's determination of damages the force and effect of a rebuttable presumption. New natural resource injury and restoration assessment regulations must be written that identify procedures for determining the reasonable cost of restoration, and that require consideration of natural recovery as a restoration method, and the availability of replacement or alternative resources. The regulation shall be issued within 2 years of enactment, and be reviewed every 5 years.

Under the bill, the goal of any restoration shall be to restore the injured natural resource to the condition it would have been in had the hazardous substance release not occurred. A trustee shall select a restoration alternative that is technically feasible, in compliance with applicable law, consistent with CERCLA and the National Contingency Plan, cost-effective, and timely. The range of alternatives considered by the trustee shall consider an alternative that relies on natural recovery. In selecting a restoration alternative, the trustee shall take into account what any removal or remedial action carried out or planned has accomplished or will accomplish. A restoration alternative may include temporary replacement of the lost services provided by the natural resource.

A responsible party may seek contribution from other liable persons for natural resource damages.

The bill proposes that where the trustees and PRPs have entered into a cooperative agreement, the period in which an action for damages may be brought would be the earlier of 6 years after the signing of the cooperative agreement, or 3 years after the completion of the damage assessment.

A trustee seeking damages for injury to a natural resource shall initiate mediation of the claim with any PRPs within 120 days after commencing the action for damages.

The amendments made by this title shall not apply to an action to recover natural resource damages under section 107(f) in which trial has begun before July 1, 1997, or in which a judgment has become final before that date.

TITLE VIII—MISCELLANEOUS

Section 801 amends section 105(a) of CERCLA to require the President to revise the National Hazardous Substance Response Plan (a part of the National Contingency Plan) to establish results-oriented procedures for remedial actions that minimize the time required and reduce the potential for exposure to hazardous substances in a cost-effective manner.

Section 802 amends section 105 of CERCLA to limit additions to the National Priorities List to 30 vessels and facilities in 1997, 25 in 1998, 20 in 1999, 15 in 2000, and 10 in any year after 2000. EPA shall prioritize the vessels and facilities on a national basis in accordance with the threat they pose to health and the environment. Additions to the list may be made only with the concurrence of the Governor of the state in which the vessel or facility is located.

Section 803 increases the authority for emergency response actions from \$2 million to \$4 million, and the time limit from 1 year to 2.

TITLE IX—FUNDING

Section 901 amends CERCLA section 111 to authorize appropriations from the Fund of \$8.5 billion for the 5-year period, fiscal years 1998 to 2002.

Section 902 amends CERCLA section 111 to allow payment of orphan shares as a use of the Fund.

Section 903 amends CERCLA section 111 to authorize appropriations from the Fund for the activities of the Agency for Toxic Substances and Disease Registry of \$50 million for each of fiscal years 1998–2002.

Section 904 sets limits for FY 1998–2002 of \$30 million per year for alternative or innovative technologies research, development, and demonstration programs; for hazardous substance research, demonstration and training, \$37 million for FY 1998, \$39 million for FY 1999, \$41 million for FY 2000, and \$43 million each year for FY 2001 and FY 2002, with no more than 15 percent of those amounts to be used for training; and \$5 million annually for university research centers.

Section 905 authorizes appropriations from General Revenues of \$250 million annually for fiscal years 1998–2002.

Section 906 limits funding for Community Action Groups to \$15 million for the period from January 1, 1997, to September 30, 2002. The section also specifies that

any response cost recoveries will be credited as offsetting collections to the Superfund appropriations account.

Section 907 amends CERCLA section 111(a) to allow the Fund to be used to reimburse PRPs if a PRP and EPA have entered into a settlement under which the Administrator is reimbursed for response costs, and the Administrator determines (through a Federal audit) that the costs are unallowable due to contractor fraud or the Federal Acquisition Regulation, or should be adjusted due to audit procedures.

PREPARED STATEMENT OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API) has long supported reform of the Superfund program. API members believe that S. 8, the "Superfund Cleanup Acceleration Act of 1997," incorporates many important and necessary reforms to the program.

As we have previously stated, the petroleum industry has a unique perspective with regard to Superfund. Petroleum-related businesses are estimated to be responsible for less than 10 percent of the contamination at Superfund sites; yet these businesses have historically paid over 50 percent of the taxes that support the Trust Fund. This inequity is of paramount concern and should be rectified forthwith. It has caused API members to focus on those elements of reform that affect the costs of the program and the authorized uses of the Trust Fund.

API members are pleased that the Senate bill would reduce the number of sites to be added to the NPL in the future and commend the sponsors for taking this important step. Limiting new additions to the NPL ensures a more reasoned, cost-efficient, and focused Federal program with reduced future funding requirements. Once again, we urge subcommittee members to add provisions to the bill limiting the Federal program to emergency removal actions at newly discovered sites.

The following sections of this testimony provide specific comments on remedy selection, state roles, liability/funding reform, natural resource damages, used oil recycling, as well as exploration and production wastes. Additional comments on various provisions contained in S. 8 are outlined in an attachment to this testimony. We—and other stakeholders—have had limited time to review the revisions to S. 8; thus, this testimony represents our initial reactions. As we develop other comments, we will forward them to you.

REMEDY SELECTION REFORM

API members continue to support remediation standards that are site-specific and risk-based and are pleased that provisions in the bill would establish requirements for facility-specific risk evaluations to determine the need for remedial actions and to evaluate the protectiveness of remedial actions. However, it should be made clear that the President is required to use the results of risk assessments in selecting the appropriate remedy.

API members believe that the remediation process should provide protection of human health and the environment through methods that are practical and achievable in a cost-effective fashion. The remedy reform measures contained in the S. 8 largely reflect these attributes, and API members endorse many of the approaches taken in the bill. As noted in our previous testimony, API members support the provisions in S. 8 that would:

- Establish a protective risk range of 10^{-4} to 10^{-6} for all remedies;
- Establish facility-specific risk evaluations;
- Establish the reasonableness of cost as a remedy selection criterion;
- Give consideration to reasonably anticipated future land and water use; and
- Consider all remedial alternatives on an equal basis, including engineering and institutional controls.

API also endorses the use of the remedy selection balancing criteria and is pleased to see that the Chairman's mark maintains the reasonableness of cost as a remedy selection criterion. The balancing criteria are the keystone of the remedy selection process, and API believes that all remedy selection procedures and applications, including groundwater remediations, should be subject to them.

API has several serious concerns with the bill, and these are outlined below.

Preference for Treatment. API is concerned that the bill's proposal to maintain a preference for treatment for some discrete areas containing hazardous substances is inconsistent with the overriding principles of remedy selection (*e.g.*, facility-specific risk assessments and the balancing of environmental and economic factors). There should be no generic preference for treatment, and this section of the bill should be deleted. The need for treatment should be determined on a site-specific

basis for each facility using the balancing criteria and the risk assessment procedures.

Presumptive Remedies. The bill would allow EPA to select presumptive remedial actions without allowing a PRP the opportunity to select more cost-effective and protective remedies. A PRP should be able to conduct a risk-based response action in lieu of a presumptive remedy. The inequity of this situation is compounded by the fact that presumptive remedies are subject to neither traditional rulemaking procedures nor judicial review. API members believe that stakeholders must have an opportunity to review and comment on such remedies and that there must be an opportunity for judicial review.

Applicable Federal and State Laws. The bill would also allow the use of “applicable” Federal and state laws and state standards in selecting remedial alternatives. We continue to hold the view that “applicable” laws should be subject to the balancing factors; otherwise, there will be diminished savings, increased costs, and little appreciable benefit to human health and the environment. Clearly, the Fund should pay for remediation only when applicable laws have been subject to remediation requirements including the balancing criteria and the risk assessment procedures.

Technical Impracticability. The consideration of technical impracticability in remedy selection and groundwater is poorly defined. Factors for determining technical impracticability need to be made clear. The bill should clearly specify the timing constraints on such determinations, and the concept of “inordinate costs” as included in the definition of technical impracticability should be defined. Moreover, there is no opportunity in the statute for PRPs to participate in the technical impracticability decision through public notice and comment.

Establishment of Standards. If no applicable Federal or State standard has been established for a specific hazardous substance and pollutant and contaminant, the bill gives the President broad authority to establish such standards. Current laws define the process for developing such standards, and this bill should not undermine the established process. We believe that generic cleanup standards are unnecessary and that remediation should be determined by site-specific risk evaluations. Most importantly, any requirement to adopt standards should not be granted without a requirement for public review and comment.

Groundwater. We find the bill’s groundwater provisions to be troublesome and confusing for a variety of reasons. First, it needs to be made clear that the requirement to protect and restore groundwater is subject to the balancing criteria and the risk assessment procedures. The reasonableness of cost must be considered when selecting a groundwater protection remedy. The Chairman’s mark would allow only inordinate costs caused by technical impracticability to be considered.

Second, remedial actions for contaminated groundwater are required to attain “a standard” that is protective of the current or reasonably anticipated use of the water. Once again, the term “standard” is not clearly defined, and API is opposed to the establishment of generic cleanup standards for groundwater and other media without due process.

Third, the bill would require restoration of contaminated groundwater to meet maximum contaminant levels or state drinking water standards throughout the groundwater plume. Such a requirement would be very difficult—if not impossible—to attain and would be achieved only at great expense. Cleanup of contaminated groundwater should be based on a reliable risk analysis and the balancing of environmental and economic factors.

Finally, as drafted, the preference for treatment appears to apply to groundwater remediation as well as remediation on land. Given the difficulty of groundwater treatment, it must be made clear that the preference for treatment does not apply to groundwater remediation.

STATE ROLES

API members support the bill’s provisions that would delegate Superfund remedial authority to states at non-Federal NPL sites. However, we have concerns about the bill’s State authorization provisions. While *delegated* States must implement provisions of the bill, there is not a similar provision for *authorized* States. Presumably, authorized States could ignore the remedy reform contained in S.8 as long as the State cleanup program met the extremely general standard of protecting human health and the environment. Authorized State cleanup programs should be implemented in accordance with the reformed Federal program.

Additionally, the bill appears to allow authorized States to apply more costly remedies at NPL sites and to recover the additional costs. States applying more strin-

gent remedies should not be able to recover incremental costs from PRPs, other agencies, or the Fund.

LIABILITY/FUNDING REFORM

API member companies support liability reform. Reform in this area will expedite cleanups and reduce transaction costs. Clearly, under current law, too much money is wasted on high legal costs. However, as an industry that has borne a highly disproportionate share of the taxes that support the Trust Fund, the petroleum industry is concerned about the impact that any liability changes would have on program costs.

We continue to question the cost of the liability exemptions outlined in S.8. For example, under the liability provisions, the Fund would pick up orphan-share costs as well as post-enactment response costs at co-disposal landfills for generators, transporters, and arrangers who contributed wastes prior to January 1, 1997. Moreover, municipal owners/operators' and *others'* liability for response costs under Superfund and any other Federal or State statute would be capped at such landfills. In addition, *de micromis*, *de minimus* parties and others would be exempt. These provisions are far too broad and the costs to the Fund are not known, but they are likely large.

We need to understand whether the cost savings associated with the remedy selection and the administrative-process provisions are sufficient to offset the additional costs arising from the shift in liability from PRPs to the Fund or, whether the program as envisioned under S.8, would place increased demands on the Fund. Taxpayers to the Fund—which is expected to cover most of the future costs of the Federal Superfund program—need to know these cost implications to evaluate legislation.

Without substantial reform of the underlying Superfund program and the tax system supporting the fund, API opposes authorization of any Superfund taxes. It is critical that Congress restructure the taxes that support the Fund. Superfund sites are a broad societal problem, and taxes raised to remediate these sites should be broadly based rather than focused on a few specific industries.

EPA has found wastes from all types of businesses at most hazardous waste sites. As consumers, as residents of municipalities, and as residents and taxpayers of a nation, our entire economy benefited in the pre-1980 era from the lower cost of handling waste. To place responsibility for the additional costs resulting from retroactive CERCLA cleanup standards on the shoulders of a very few industries when previous economic benefits were widely shared is simply unfair.

The additional costs to the Fund from exempting parties from liability must be offset by other reform measures including remedy selection reform.

NATURAL RESOURCE DAMAGES (NRD)

API is an active member of the Coalition for Legislative NRD Reform and strongly supports the coalition's positions and the testimony they are submitting. While the bill would favorably repeal liability for non-use values, API members are extremely concerned by the bill's failure to require *de novo* trials of NRD cases and to distinguish the objective of restoration from remediation. The focus of the bill should be on restoring the functions of natural resources that were committed to public use at the time of the injury.

USED OIL RECYCLING

The bill exempts recyclers of scrap glass, metal, paper, plastic, rubber, textiles and spent batteries from liability; however, used oil recycling is noticeably absent from the list. If the Senate is intent on maintaining recycling exemptions, API members feel strongly that used oil recycling, including used oil filters, should be exempt as well. Adding used oil and used oil filters to the list of recyclable materials encourages recycling of these valuable commodities.

EXPLORATION AND PRODUCTION WASTE

As noted in our testimony of March 5, 1997, API believes that the exploration and production waste language in the law needs clarification. Some court opinions have misinterpreted congressional intent to exempt high volume, low-toxicity wastes, which EPA has determined do not need to be treated as hazardous wastes. API continues to urge Congress should clarify that these wastes are excluded under Superfund.

CONCLUSION

In summary, API commends members of the subcommittee for their continuing efforts to develop meaningful Superfund reform. However, we believe our concerns must be addressed if the Superfund process is to be truly reformed. The cost constraining measures contained in S. 8 are fundamental, and any weakening of these provisions may jeopardize Superfund reauthorization. We believe it is important that the reauthorization process continue, and we look forward to working with subcommittee members to accomplish this goal.

ADDITIONAL COMMENTS

Protection of Human Health

- The bill says that a remedial action shall be considered to protect human health if a residual risk from exposure to threshold carcinogenic and noncarcinogenic hazardous substances does not exceed a hazard index of 1. This is overly prescriptive. API recommends using the wording “shows no appreciable risk of deleterious effects” as opposed to a specific index number.

State Applicable Standards

- The bill allows for the application of more stringent state standards. States should have the flexibility to impose—where appropriate—less stringent state standards.
- Waiver provisions are established where the Administrator determines that it is not appropriate for a remedial action to attain a Federal or state standard. Historically, waivers have been difficult to obtain. Rather than being established as conditions for a waiver, these provisions should be set out as conditions where Federal and state standards would not apply.
- New state laws that may create standards with general applicability should be subject to a rulemaking process.
- Contaminated media is exempt from the substantive provisions of section 3004 of RCRA. Since many states are authorized to implement these provisions, the exemption should also apply to state corrective action requirements.

Land and Water Use Considerations

- In determining reasonably anticipated future land use, EPA should consider the views of the broadest spectrum of stakeholders including facility owners and operators as well as potentially responsible parties. Facility owners and operators should be listed among those whose views are to be considered regarding reasonably anticipated future uses.
- In determining reasonably anticipated future use of water resources, the bill requires EPA to give substantial deference to classifications and designations in State groundwater protection programs. API agrees that State classifications are important, but we also believe additional factors should be considered (*e.g.*, current water uses, recent development patterns, population projections, as well as the plans of the owner/operator of the facility).

Groundwater

- The bill would require protection of uncontaminated groundwater and restoration of contaminated groundwater that is suitable for use as drinking water. The bill needs to make clear that the requirements are applicable only to drinking water used for human consumption.
- API endorses provisions that would give consideration to reasonably anticipated future land and water use. However, we are concerned that in considering reasonably anticipated future use, EPA may consider the potential for “beneficial use” which encompasses conservation and aesthetic benefits. The consideration of these speculative factors is troublesome and could lead to requirements to remediate all groundwater.

Judicial Review

- Provisions should be made that would allow pre-enforcement judicial review.

Risk Assessments

- The bill establishes requirements for facility-specific risk evaluations. Such requirements are supported by API members.
- The bill should be clarified to require that facility-specific risk assessments be used in selecting the remedy.
- The bill should also include language to clarify that facility-specific risk evaluations are tiered. A full risk assessment may be unnecessary at every site.

- Additionally, the bill should make clear that PRPs have the right to conduct risk assessments in authorized or delegated states.

ROD Reopeners

- API supports the concept of reviewing proposed remedies and previously negotiated RODs as expressed in the bill. However, qualifications for members of the remedy review board and PRP participation must be clarified.

Future Use of a Facility

- The bill provides that a facility deemed suitable for unrestricted use would be subject to no further liability while a facility available for limited use would be reviewed every five years and potentially required to conduct additional remedial action. A facility available for reuse of any type should be subject to no further liability or review; otherwise the bill may have a negative impact on brownfield programs.

Brownfields

- The bill does not explicitly release owners, sellers, or buyers of brownfield properties from liability. This will result in impediments to recovery of such properties for re-use.

Community Participation

- Section 301 defines an affected community to be a group of two or more individuals who may be affected by the release or threatened release of a hazardous substance. The definition of affected community should be limited to persons living within some reasonable proximity to a site.
- The local community and its advisory group should be required to submit comments on remedy selection in a timely manner.
- The process for selecting facility employees for community advisory groups should be determined by the facility.

Federal Facilities

- Federal employees, who fail to take or comply with response action requirements, will not be subject to criminal liability unless they have failed to ensure that sufficient funds were available in the President's budget. This provision should be deleted. Criminal prosecution under environmental laws requires the government to prove criminal intent.

PREPARED STATEMENT OF THE AMERICAN PUBLIC HEALTH ASSOCIATION AND THE NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS

The following statement is submitted on behalf of the American Public Health Association (APHA) and the National Association of County and City Health Officials (NACCHO). APHA represents a combined national and affiliate membership of more than 50,000 health professionals. NACCHO is the principal organization representing local public health officials and serves all 3000 of the nation's local health departments—in cities, counties, and townships. The statement explains why Superfund is a public health program and urges the committee to keep public health issues in the forefront as it considers reauthorization of this program.

SUPERFUND IS A PUBLIC HEALTH PROGRAM

The underlying purpose of Superfund is to prevent disease and disability due to toxic exposures. Human exposures to toxic substances have many potential adverse health outcomes, including neurological damage, birth defects, and cancer. Preventing the exposure of entire communities to potentially devastating health consequences is no less important than protecting people from infectious diseases such as polio or diphtheria, or protecting them from food poisoning. Identifying potential health hazards and cleaning up hazardous waste sites are just as important in protecting public health as vaccinating children or requiring safe food processing.

Public health does not concern itself solely with the health of individuals. It encompasses a much broader concept of community health and well-being. Public health practice is a comprehensive approach to ensuring that individuals and communities remain healthy—this means tracking the occurrence of disease, providing health care services, identifying and addressing hazards before they cause damage, and educating the public about how to prevent disease and injury.

Public health involvement in Superfund site assessment and remediation has been built into the program from the beginning, primarily through the activities of the Agency for Toxic Substances and Disease Registry. However, the full potential

of public health approaches to improve the efficiency and effectiveness of Superfund has never been fully realized. To achieve this potential, the Superfund program must require early, strong, and meaningful involvement of public health agencies and experts at local hazardous waste sites, beginning at site discovery.

PUBLIC HEALTH PARTICIPATION IS ESSENTIAL IN ADDRESSING HAZARDOUS WASTE SITES

Public health experts, Federal, state and local, must be engaged actively at the earliest stages of the Superfund process. When a hazardous waste site is identified in a community, everybody has questions and concerns. Responding to these requires collection of the proper kinds of data using the most appropriate scientific methods and practices. Public health assessments, using the best epidemiologic and toxicological methods and data available, serve two important purposes. First, they alert all the parties to what the key public health problems are. Second, they can alleviate many concerns by ruling out health problems that are unrelated to the site. When a hazardous waste site is identified, there is a window of opportunity for establishing baseline health and exposure data, understanding potential health risks, and developing plans for remediation that specifically address those health risks. This window often is closed before public health expertise has been tapped. Early involvement by public health experts assures that public health needs will determine the priorities for clean-up. Early public health involvement will improve the ultimate outcome of Superfund site clean-ups in achieving and documenting better public health outcomes and sustaining healthy communities.

Public health involvement must extend to off-site activities as well. For instance, testing of air, water, and soil in nearby locations is necessary to identify more precisely which neighbors of a hazardous waste site may be subjected to toxic exposures, and which are not. This is important also in addressing the interactive effects of exposures to a community through air, water, and soil contamination, whether or not all such contamination is attributable to the site itself.

Local public health agencies, which often are left out or brought in late in the Superfund process, are ideally situated to spearhead early public health involvement in hazardous waste sites. They bring a critical local perspective to a process that is largely governed by state and Federal agencies. They can provide an immediate response to imminent hazards. For instance, a local health department can promptly arrange a safe drinking water alternative where there is suspected drinking water contamination around a hazardous waste site.

The Superfund statute requires action by Federal and state agencies that is largely confined to the sites, with little flexibility to address community problems and concerns. Local health agencies, which have no statutory authority related to the Superfund process, have responsibility and expertise for protecting the health of the community and addressing the community's health concerns. They know the demographic and cultural characteristics of the community and they know the other health problems of the community. This knowledge, and the relationships that have been cultivated by addressing other community health issues, can be critical when dealing with the myriad problems caused by a hazardous waste site.

COMMUNITY INVOLVEMENT IS INTEGRAL TO A PUBLIC HEALTH APPROACH

Community involvement is necessary not only because the Superfund process is intended to protect the community, but also because communities can offer extremely valuable information and assistance. Residents have knowledge that nobody else has. They know how a site has been used in the past, who lived near the site, and who has moved away. This information is essential to the conduct of studies that help us understand both the short-term and long-term health effects associated with a hazardous waste site. For example, in Michigan City, Indiana, a partnership between the local health department and a minority health coalition uncovered exposures to contaminated game and fish by an African-American community that hunted and fished for food.

Community participation in Superfund processes also helps the public better understand what has taken place at the site, what will be done about it and what it means for their health. The Presidential/congressional Commission on Risk Assessment and Risk Management strongly recommends including all stakeholders in environmental risk management decisions at the earliest possible time. Information builds trust and support within the community and helps individuals affected by toxic exposures to take appropriate steps to protect their own health. A successful and efficient Superfund clean-up process is one that avoids frustration, stalemates, and delays due to poor communication and misunderstandings. It is one that creates a sense of ownership and shared responsibility in the entire community, including residents, community organizations, health professionals, and elected officials. It is

one that employs to best advantage all the community's resources in cleaning up the site to protect public health.

SUPERFUND MUST SUPPORT THE USE OF PUBLIC HEALTH TOOLS.

Data collection, research, ongoing disease surveillance, and health education must be adequately supported to enable Superfund to achieve its purpose of protecting the health of communities. The Agency for Toxic Substances and Disease Registry (ATSDR) is the cornerstone of public health in the Superfund program, in partnership with state and local health departments, the National Institute for Environmental Health Science, and universities. Within the limits of the resources available to it, ATSDR has performed well. Local and state public health departments that have used ATSDR's technical expertise in addressing hazardous waste sites in their communities have a high regard for its work.

ATSDR has also invested in building the capacities of state and local health departments to respond to hazardous waste issues, thus increasing our nation's ability to meet public health concerns related to hazardous waste. However, health departments, physicians and other health care providers in communities around Superfund sites have a significant unmet need for training and technical assistance in matters of hazardous substances.

In order to do its job better, ATSDR also needs expanded authority and flexibility in conducting site-specific public health assessments, health studies, surveillance and registries. ATSDR's various activities complement each other and work together to enable Superfund site activities to address adequately the health needs of communities. Superfund reforms must provide expanded support for ATSDR.

For further information, please contact: Ilisa Halpern, American Public Health Association; Donna Grossman, National Association of County and City Health Officials.

PREPARED STATEMENT OF JOHN H. SULLIVAN, DEPUTY EXECUTIVE DIRECTOR, AMERICAN WATER WORKS ASSOCIATION

INTRODUCTION

The American Water Works Association (AWWA) appreciates the opportunity to present its views on Superfund Reauthorization and S.8, The Superfund Cleanup Acceleration Act of 1997). AWWA is the world's largest and oldest scientific and educational association representing drinking water supply professionals. The Association's 54,000 plus members are comprised of administrators, utility operators, professional engineers, contractors, manufacturers, scientists, professors and health professionals. The Association's membership includes over 3,800 utilities which provides over 80 percent of the nation's drinking water. Since our founding in 1881, AWWA and its members have been dedicated to providing safe drinking water.

AWWA believes few environmental activities are more important to the health of this country than assuring the protection of water supply sources, and the treatment, distribution and consumption of a safe and healthful supply of drinking water. AWWA strongly supports measures which protect groundwater from contamination and the remediation of drinking water sources from groundwater. AWWA urges the committee to include groundwater remedy standards at least as protective as current law in the Superfund reauthorization bill.

AWWA commends Senator Chafee and Senator Smith for their leadership in moving the legislative process forward by introducing S.8 and holding hearings on Superfund Reauthorization. AWWA supports superfund reforms which will streamline the process, resolve the liability issues which are preventing clean-up and effectively remediate contaminated sites. However, AWWA is concerned that Superfund reforms adequately protect public health and preserve our water supplies for future generation. In this statement, AWWA will focus on groundwater protection and remediation; however, many of the issues presented also apply to surface water.

Groundwater

Groundwater is one of the most finite natural resources of this country. It is valuable, not only as an ecological resource, but is also the only source of drinking water for millions of Americans. Approximately 100 million Americans use groundwater from community public water systems. Another 20 million consumers get their drinking water from private wells which are fed by groundwater.

Increasingly, public water suppliers throughout the country are closing down wells dues to pollution. The most recent highly publicized case is in San Bernardino, California, where some of the city wells had to be closed because of ammonium per-

chlorate contamination—a rocket fuel contaminant that is not regulated under the Safe Drinking Water Act (SDWA). Another chemical not regulated under the SDWA, MTBE (methyl-t-butyl ether), which is an additive to gasoline to comply with the Clean Air Act is now being found increasingly in groundwater. MTBE, because a small amount produces a foul taste, renders groundwater unfit to drink at levels far below a level which would pose a health threat. These incidents illustrate how vulnerable groundwater is to contamination, not only from highly toxic and mobile concentrations of pollutants, but also from lower levels of contamination.

Much of the cost of obtaining alternative supplies of drinking water or installing expensive treatment facilities has been borne by the drinking water consumer rather than the those responsible for the pollution. AWWA urges the committee to address this inequity in the cost of cleanup and provide cleanup standards that will make groundwater fit for use as a drinking water source, where practicable, and prevent further contamination of uncontaminated groundwater (or surface water) in Superfund reauthorization.

Clean Up Standards

While it is recognized that Superfund reform needs to provide flexibility for effective remediation, there is concern that the elimination of “applicable and relevant appropriate requirements” (ARARs), such as the standards promulgated under the Safe Drinking Water Act, from the law for use in cleanup standards may not provide for protection and remediation of drinking water source supplies. Other ARARs could be used to address contaminants that are not regulated under the SDWA. Retention of the use of ARARs would provide a means of determining specific cleanup actions and standards. Remedies such as attenuation and biodegradation alone cannot be used to satisfy cleanup standards unless it occurs in a relatively short period of time. AWWA strongly urges the committee to retain stringent cleanup standards for groundwater (and surface water).

Costs and Benefits

AWWA supports the concept of using costs and benefits in implementing environmental statutes. However, AWWA is concerned that the value of groundwater both at the time of remediation and in the future be given high priority in these decisions. The reasonableness of cost alone in determining the technical practicability of a cleanup could potentially block the cleanup of a water supply even if there is a need for the water for drinking water purposes. The value of groundwater as a future drinking water source must be taken into consideration even if it is not used as a drinking water source at the time of remediation. Naturally occurring contamination should not be used as a sole factor in determining the suitability of groundwater as a drinking water source. Clean up of contaminants that do not naturally occur in the groundwater still should be required. AWWA urges the committee to require formal consultation with local public water suppliers in determining beneficial uses of groundwater.

Permanent Solutions

Superfund reforms must continue to favor permanent solutions for remediation and protection of groundwater. Water supplies that are or may be used as drinking water sources must be remediated, if feasible, by methods that offer permanent solutions rather than point-of-use devices or provision of alternative water supplies. Remedies that serve to protect currently uncontaminated water supplies which are or may be used as drinking water sources from becoming contaminated must take precedence over other remedies. Point-of-use devices, point-of-entry devices, and bottled water should be considered in remediation as a temporary expedient to resolve an urgent situation. Further, at sites in which it has been determined that it is not technically practical to clean up the groundwater as part of remediation for the site, permanent measures must be implemented to prevent the contaminant of adjacent uncontaminated groundwater. AWWA also recognizes the need to remediate highly toxic and mobile sites or “hot spots” but sites of lesser toxicity must also be addressed in the law, particularly when there is contamination of groundwater. AWWA recognizes the difficulties in remediating groundwater; however, to ensure the availability of groundwater as a drinking water source permanent solutions must be implemented wherever possible to assure a continuing supply of drinking water.

Local Jurisdictions

AWWA urges a strong role for local jurisdictions in organizing local advisory groups, evaluating state proposals to receive delegated authority, and in evaluating remedy selection, particularly as they pertain to long-term plans for drinking water supplies. Water suppliers must be part of any remedy selection process involving

groundwater. Remedy selection of site which involves contaminated groundwater must not only involve the jurisdiction in which the site is located, but water suppliers in other jurisdictions which use the aquifer as a source drinking water. Without required inter-jurisdictional coordination in these cases, site remediation may not protect the drinking water sources of other communities.

CONCLUSION

In summary AWWA recommends that the committee include the following points in the Superfund reauthorization bill:

- Put the cost of clean-up of groundwater on those responsible for the contamination rather than public water systems and consumers.
- Retain stringent standards for the clean-up and protection of groundwater that is or may be used as a drinking water supply.
- Assure that the beneficial use of groundwater as an existing or potential source of drinking water be given high value in cost-benefit analysis determinations.
- Favor permanent clean-up solutions to remediate and protect drinking water sources.
- Increase participation of local jurisdictions and public water suppliers in the Superfund decisionmaking process concerning groundwater that is or may be used as a drinking water supply.

AWWA thanks you for the opportunity to present comments on Super Fund Reauthorization. We hope that comments will be helpful to the committee in its deliberations. AWWA looks forward to working with the committee on these and other Superfund issues. AWWA was very pleased to work with the committee in 1995–1996 in the successful reauthorization of the Safe Drinking Water Act. bi-partisan cooperation and consensus building among the majority party, the minority party, the Administration and affected parties such as state and local government and the drinking water community was the hallmark of that effort. We encourage the Senate to move forward on Superfund reform in a similar manner and to reach a bi-partisan agreement. S. 8 is a good starting point for those deliberations.

This concludes the AWWA statement on Superfund Reauthorization and S. 8, The Superfund Cleanup Act of 1997.

PREPARED STATEMENT OF THE ASSOCIATION OF METROPOLITAN WATER AGENCIES

RE: SUPERFUND—REMEDY SELECTION AND COMMUNITY PARTICIPATION

Groundwater is a finite resource and one that nearly 120 million Americans rely upon as a primary source of drinking water. About 100 million of these consumers are served by more than 40,100 community water systems using groundwater for all or most of their water supply. The remaining 20 million consumers rely on private wells, which are fed by groundwater and are not protected by Federal or State drinking water standards.

Today, drinking water suppliers in different regions of the country are closing down wells due to pollution and seeking alternative sources of supply for the communities they serve. In other cases, the water utility has had to install expensive treatment methods they would not have otherwise needed. Much of this has occurred at the expense of drinking water consumers and not those responsible for the pollution.

Given the overwhelming need for clean groundwater and the costly implications of pollution, the Association of Metropolitan Water Agencies (AMWA) strongly urges the Senate Committee on Environment and Public Works to develop a Superfund reauthorization bill with groundwater remedy standards at least as stringent as current law. It should ensure the protection of future sources of drinking water and place appropriate and fair responsibility for cleaning up polluted groundwater on the polluter, and not water suppliers and consumers.

AMWA is comprised of the nation's largest publicly-owned drinking water systems, represented by their general managers and commissioners of water. Altogether, AMWA member agencies serve nearly 100 million Americans with clean, safe water.

Having reviewed the remedy selection and community participation titles of the August 28, 1997, draft proposal, AMWA offers the following specific comments:

PREFERENCE FOR TREATMENT

The association supports the continuation of the current law's broad preference for treatment and could not support the narrow preference for "hot spots" only. We appreciate the need to address highly toxic and mobile concentrations of pollutants,

but focusing only on hot spots could leave the water supplier with a future cleanup burden. Such an amendment could lead to water suppliers having to treat low-level contamination to satisfy drinking water standards or other health standards if the circumstances of the pollution do not meet the hot spot definition.

GENERAL RULES

AMWA believes the general rule governing remedy selection should include a statement that underlines the importance of protecting uncontaminated groundwater and, wherever practicable, restoring contaminated water to beneficial uses.

LEGALLY APPLICABLE AND RELEVANT AND APPROPRIATE REQUIREMENTS

AMWA is very concerned that the elimination of relevant and appropriate requirements or “RARs” could leave water systems responsible for another party’s pollution simply because no legally applicable requirement exists for the given contaminant. Under the August 28 draft proposal, if no official standard exists, a remedy is to be protective of public health if risk falls within a certain range. While this approach is valuable, RARs provide a State or other entity with greater authority to require a polluter to conduct a cleanup, as current law has shown.

In California, water systems are just recently finding MTBE, a fuel additive, and ammonium perchlorate, a constituent of rocket fuel, in groundwater supplies. No regulations exist for these two chemicals, nor is there enough information to confidently determine risk. Without RARs, it would seem that MTBE and perchlorate contamination would go unaddressed under the August 28 draft proposal. Retaining RARs, however, would give States at least some means to direct polluters to clean up such contamination. This could mean reliance upon anti-degradation laws or other statutes or rules providing adequate authority to require a cleanup.

DETERMINATION OF BENEFICIAL USES OF GROUNDWATER

AMWA strongly urges the committee to require formal consultation with local water suppliers when EPA and the States determine beneficial uses of groundwater supplies. The association applauds the Chairman for adopting the state comprehensive groundwater management plans endorsed by EPA to determine beneficial uses, but local water suppliers are integral to predicting use patterns and needs in a given area. Most large water suppliers have conducted detailed studies to plan for future needs. To ignore these plans could leave a community unprepared.

UNCONTAMINATED GROUNDWATER

AMWA believes the August 28 draft proposal could be more protective of uncontaminated groundwater, as it now applies only to groundwater suitable for use as drinking water. This approach is too narrow and discounts sources that could be needed in the future, but are not being used as a drinking water source at the time a remedy decision is made. The language sets aside the inherent value of groundwater simply because we have no immediate practical use for it, and it threatens to allow polluters to avoid their rightful responsibilities.

GROUNDWATER NOT SUITABLE AS DRINKING WATER

In some regions of the country, water suppliers rely on groundwater containing naturally occurring contaminants. In these cases, suppliers treat this contamination in order to meet community demands.

Under the August 28 draft proposal, groundwater currently used for drinking water, but containing naturally occurring contaminants, would be exempt from treatment requirements under Superfund. The proposal allows the existence of naturally occurring contaminants in groundwater to preclude its designation as a drinking water source, thus getting around the cleanup of contaminants that are not naturally occurring in the aquifer. AMWA believes naturally occurring contamination should not be used as a sole factor in determining the suitability of groundwater as a drinking water source.

TECHNICAL IMPRACTICABILITY (TI)

AMWA supports the inclusion of “inordinate cost” as a factor in determining whether a remedy is technically impracticable, as well as the concept that a TI determination may be made at any time after adequate information is available. In addition, the association strongly supports the requirements for a polluter to execute, after a TI waiver is granted, the following, at a minimum:

- prevention or elimination of exposure or ingestion of the pollutant in excess of the MCL,
- containment of the pollution source,
- containment of contaminated around water,
- prevention of further contamination, prevention of impairment of surface water designated uses under the Clean Water Act,
- long-term monitoring, and
- assurance that the party responsible for the cleanup assumes responsibility and liability and all associated incremental costs for operation, maintenance and delivery of drinking water for present and anticipated future uses until such time as the level of contamination is reliably and consistently below the MCL.

Also, use of point-of-use or point-of-entry devices and bottled water should be explicitly temporary and for the purpose of resolving an urgent situation. Consumers are entitled to a consistent and permanent source of safe drinking water they do not have to treat themselves. Nor should consumers have to rely for any significant period of time on bottled water to satisfy their everyday needs.

Without these requirements, it is unclear how uncontaminated water would be protected or how exposure to contaminants would be prevented once a TI waiver is granted.

Maximum Contaminant Level (MCL)

To ensure compliance with Federal drinking water regulations, water suppliers often seek to keep contaminant levels reliably and consistently below the MCL. Given that cleaned up groundwater, whether returned to the aquifer or sent to a distribution system, is anticipated to be used as drinking water, consumers would be best served if parties responsible for cleanup follow the same rule of thumb to which water suppliers subscribe.

This is the approach AMWA recommends if the committee seeks to provide relief to responsible parties by allowing treated groundwater to be sent to a distribution system, storage tank or reservoir, rather than back to the aquifer where it may come in contact with the source of contamination again.

Community Participation

The association urges the committee to include in its reauthorization bill a requirement that any remedy decision involving groundwater be made in consultation with drinking water suppliers whose districts are adjacent to the contaminated aquifer. These systems and their customers will be affected in one way or another by the contaminated aquifer.

The Association of Metropolitan Water Agencies recognizes the difficulties involved in treating polluted groundwater or otherwise preventing exposure to harmful contaminants. Nonetheless, AMWA strongly believes it is the responsibility of the polluter, not the consumer or the water supplier, to treat contaminated water, where possible, and protect uncontaminated groundwater to ensure its availability as a drinking water source.

We hope you have found our comments on the remedy selection and community participation titles helpful as you prepare for the September 4 hearing. In the near future, we plan to provide you with the association's thoughts on other reauthorization issues.

If you have any questions in the meantime, please don't hesitate to call me.

HAZARDOUS WASTE: HUMAN HEALTH EFFECTS**BARRY L. JOHNSON**

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INTRODUCTION

Concerns about uncontrolled hazardous waste sites (HWS) and other sources of unplanned releases of hazardous substances into the environment are wide ranging. Specific concerns regarding HWS include adverse impact on human health, expensive cleanup costs, depreciated property values, and ecological damage. In particular, the potential adverse health impact of exposure to hazardous substances from waste sites continues to be of great concern to the public. These concerns are evident in many countries. For instance, Cortinas de Nava observes that Agenda 21, which was developed by the United Nations Conference on Environment and Development in 1992, endorses control and management of toxic wastes (Cortinas de Nava, 1994). She also notes that about 90 countries have prohibited the importation of hazardous wastes, to protect against health and ecologic damage. Similarly, Winter records that national legislation to control toxic wastes began to appear in Europe in the 1970s and that concern for public health was the key underpinning of this legislation (Winter, 1994).

The primary purpose of this paper is to summarize the data and information that shape the Agency for Toxic Substances and Disease Registry's (ATSDR) view that hazardous waste represents a significant concern as an environmental hazard to human health. The data in this paper will emphasize a national perspective on sites in the aggregate, rather than individual site-specific outcomes.

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2. Abbreviations: ATSDR, Agency for Toxic Substances and Disease Registry; CERCLA, Comprehensive Environmental Response, Compensation, & Liability Act; CBO, U.S. Congressional Budget Office; CNS, central nervous system; DOD, Department of Defense; DOE, Department of Energy; EPA, U.S. Environmental Protection Agency; GAO, General Accounting Office; GI, gastrointestinal; GIS, Geographic Information System; HazDat, Hazardous Substance Release/Health Effects Database; HSEES, Hazardous Substance Emergency Events Surveillance; HWS, Hazardous Waste Sites; MUS, musculoskeletal; NER, National Exposure Registry; NHIS, National Health Interview Survey; NPL, National Priorities List; NRC, National Research Council; RCRA, Resource Conservation and Recovery Act; TCE, trichloroethylene; VOCs, volatile organic compounds.

3. Key words: ATSDR, CERCLA, exposure pathways, hazardous waste, human health, NPL sites, RCRA, toxicological profile, workers.

4. Reprinted from *Hazardous Waste: Impacts on Human and Ecological Health* (1997) (B.L. Johnson, C. Xintaras, J.S. Andrews, Jr., eds.), ATSDR, Princeton Scientific Publishing, Co., Princeton, NJ, pp. 283-304.

The material in this paper covers three areas pertaining to human health and hazardous waste. First, data specific to the nature and extent of releases of substances from uncontrolled hazardous waste sites will update a previous publication (Lichtveld and Johnson, 1994). The description here will include statistical data on the percentage of sites representing completed exposure pathways, categories and extent of human health hazard, and effects on human populations. Second, the effects of another form of hazardous waste, substances released into the environment under emergency conditions, will be presented. These data will summarize ATSDR surveillance data bearing on the frequency of occurrence, nature, and health impact of substances released under emergency situations. Third, the effects of hazardous waste management on the safety and health of workers will be described. This will consist of a summary review of recent literature on the hazards faced by waste site remediation workers as well as workers who work in waste disposal facilities.

The secondary purpose of this paper is to provide the data and published literature used by ATSDR in testimony to the U.S. Congress. In particular, four key conclusions in ATSDR's Congressional testimony (Johnson, 1995a) pertaining to human health findings will be discussed later in this paper.

The findings and their interpretation described here are intended to add to the debate within the scientific community on the extent of health risk posed by HWS. For example, the U.S. National Academy of Sciences concluded that adverse health effects had occurred in community populations at some individual HWS, but that the overall impact of HWS in the U.S. environment was unknown (National Research Council [NRC], 1991). Another review found little evidence that HWS were associated with adverse human health impacts (Grisham, 1986). In a study of comparative health risks posed by groups of environmental hazards, the U.S. Environmental Protection Agency (EPA) ranked HWS 17th out of 31 hazards, suggesting that HWS are of medium priority as a risk to human health and the environment (EPA, 1987). However, EPA's comparative risk assessment findings pertaining to uncontrolled hazardous waste sites were based on limited environmental and human health data available to them in 1987 (Johnson, 1995b).

NUMBERS OF HAZARDOUS WASTE SITES AND COSTS

Hazardous waste has often been discarded into the environment in landfills and on industrial properties. In turn, these properties have themselves been discarded. At the end of 1995, EPA's inventory of HWS listed approximately 40 000 sites, though EPA inactivated 24 000 sites in 1995, because the sites posed little or no threat to health or the environment (Browner, 1995). At this writing, 1296 sites are listed on or proposed for EPA's National Priorities List (NPL), which are the sites posing the greatest threats to public health and the environment.

Of particular importance because of their potential high costs to remediate are HWS associated with U.S. federal government facilities. As of August 1994, 150 federal facilities were on the NPL (EPA, 1994). These facilities include sites operated by the Department of Defense (DOD, military bases) and the Department of Energy (DOE, weapons complexes). One source (NRC, 1994) refers to 17 482 contaminated sites at 1855 DOD installations as of September 1990 and

3700 sites at 500 DOE facilities. Some of the DOE sites are current or former nuclear weapons facilities that cover large geographic areas and are toxicologically very complex in terms of the mixed wastes released into the environment.

In 1991, EPA estimated that cleaning up the nonfederal NPL sites could cost more than \$30 billion. In addition, they estimated that about 4000 facilities, representing 64 000 solid waste management units covered under the Resource Conservation and Recovery Act (RCRA), may require cleanup, but no cost estimates were provided (Habicht, 1991).

A study completed by Russell et al. in 1991 projected that cumulative cleanup costs for all sites from the year 1990 through 2020, using current remediation practices, will be approximately \$750 billion, with plausible lower bound at something less than \$500 billion and upper bound at approximately \$1 trillion (Russell et al., 1991). Their analysis included both federal and nonfederal sites and covered NPL sites, state and private sector waste remediation programs, underground storage tanks, and RCRA sites requiring corrective action. Specific to NPL sites, Russell et al. estimate cumulative costs through year 2020 to range from \$106 billion (assuming 2100 nonfederal sites) to \$302 billion (assuming 6000 nonfederal sites). Less stringent cleanups would lower these projected costs; greater stringency would increase them. Russell et al. "best guess" cumulative remediation costs for federal facilities were \$240 billion for DOE sites and \$30 billion for DOD sites.

A separate set of cost estimates was released in 1994 by the U.S. Congressional Budget Office (CBO) (1994), which analyzed three scenarios for Superfund costs after 1992. The CBO estimates were based on assumptions related to the number of nonfederal NPL sites. The base-case estimate is \$74 billion in discounted, present-worth dollars; the low-case estimate is \$42 billion and the high-case estimate is \$120 billion. The assumptions of 2300 nonfederal NPL sites in the low case, 4000 in the base case, and 7000 in the high case explain most of the differences in CBO's estimated costs. Annual undiscounted costs in the base-case peak are \$9.1 billion in the year 2003; they average \$2.9 billion per year through the year 2070 (CBO, 1994).

Estimates by the CBO of future Superfund costs are different from earlier estimates developed by EPA and Russell et al. (Habicht, 1991; Russell et al., 1991). The main factors that explain the differences are CBO's broader coverage of costs and use of discounted dollars, different average cleanup costs per site, and different numbers of sites on the NPL. Specifically, the CBO figure includes all future public and private Superfund expenditures; Russell et al. place estimates of public and private costs for study and cleanup at NPL sites, but omit administrative and legal expenses and the costs of screening and removals at non-NPL sites. Furthermore, the CBO estimate is in present-worth dollars; Russell et al. express their figures in undiscounted dollars (Russell et al., 1991; CBO, 1994).

In addition to the costs of site remediation, the General Accounting Office (GAO) estimates that over \$31 billion will be needed for long-term maintenance and monitoring costs of NPL sites over the next decade. Of this amount, \$18 billion would come from private sector parties, \$8

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billion from states, and \$5 billion would be paid by the federal government. GAO examined 275 current NPL sites and found that 193 sites require long-term maintenance, estimated by GAO to last 30 years or more (GAO, 1995).

By any measure, the cost in money and personnel resources to remediate the legacy of hazardous wastes left in the U.S. environment will be huge if current policies on site identification, prioritization and remediation are maintained. Because of the large commitment of resources to remediating hazardous waste sites and related environmental problems, it is important to know the extent of human health hazard in order to compare costs and benefits. This paper is intended to provide data relevant to the cost/benefit calculus.

SUBSTANCES RELEASED FROM SITES

Remediating HWS requires knowledge about what has been left in the environment. From data in ATSDR's Hazardous Substance Release/Health Database (HazDat) data system¹, more than 2000 unique substances have been identified in environmental media sampled by EPA during site characterization studies. The data aggregated in HazDat have enabled ATSDR analysts to make observations about:

- ☐ Sources of HWS and chemical classes
- ☐ Priority hazardous substances associated with HWS
- ☐ Environmental media that are most often contaminated and the contaminants found in completed environmental pathways
- ☐ Primary combinations of mixtures of contaminants

Sources of HWS and Chemical Classes

The sources of uncontrolled waste are myriad. Data evaluated in HazDat from all public health assessments conducted by ATSDR through September 1994, for over 1300 HWS, including over 1000 current HWS, indicate that about 42% of the current NPL sites are waste storage/treatment facilities or landfills, 31% are abandoned manufacturing facilities, 8% are waste recycling facilities, 5% are mining sites, and 4% are government properties, with the rest falling into miscellaneous categories.

Drawing from data in HazDat, the classes of contaminants most frequently reported in the agency's public health assessments (n = 1719) conducted through September 1994 are: volatile organic compounds (VOCs) (74% of assessments), inorganic substances (71%), halogenated pesticides (37%), polyaromatic hydrocarbons (25%), phenols/phenoxy acids (23%), phthalates (22%), and nitrosamines/ethers/alcohols (15%). Within these chemical classes are substances that differ widely in toxicologic and human exposure properties. These differences point to the need to set priorities for individual hazardous substances.

¹HazDat is an ATSDR database on HWS. It contains environmental contamination, toxicological, and human health data on over 2000 HWS. HazDat is available through the Internet World Wide Web, (<http://atsdr1.atsdr.cdc.gov:8080>).

Priority Hazardous Substances

Of the more than 2000 unique substances found at waste sites in the United States, approximately 700 have been detected in contaminated environmental media at more than three NPL sites (an arbitrary number selected for comparison). From this roster of 700 chemicals, ATSDR and EPA jointly developed a list of 275 priority substances that pose the greatest hazard to human health. The list is mandated by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, and is based on three criteria: frequency of occurrence of a substance at NPL sites, the substance's toxicity, and the potential for human exposure (ATSDR, 1994). As an illustration of the list's content, the top 10 priority substances are presented in the center column of Table 1.

TABLE 1. Superfund Top 10 Priority Hazardous Substances¹ and the 10 Substances Found Most Often in Completed Exposure Pathways

Rank	Priority Substance	Substance in Completed Exposure Pathways (% of 1356 sites)
1	Lead	Trichloroethylene (45)
2	Arsenic	Lead (42)
3	Mercury, metallic	Tetrachloroethylene (34)
4	Benzene	Arsenic (29)
5	Vinyl chloride	Benzene (27)
6	Cadmium	1,1,1-Trichloroethane (24)
7	Polychlorinated biphenyls	Cadmium (23)
8	Benzo(a)pyrene	Chromium (23)
9	Chloroform	Chloroform (19)
10	Benzo(b)fluoranthene	Manganese (18)

¹ ATSDR, 1994.

CERCLA requires ATSDR to prepare a toxicological profile on each priority substance and to make these profiles available to the public. Furthermore, CERCLA directs that ATSDR initiate research to fill key data gaps for each substance. At this writing, 117 key data gaps are being filled for 38 top-ranked Superfund hazardous substances (ATSDR, 1994). The data gaps include gaps in knowledge about the toxicity of individual substances as well as gaps in human exposure characterization. Findings from research that fill the key data gaps will be used to improve risk assessments of HWS and public health assessments of community populations.

**COMPLETED ENVIRONMENTAL MEDIA PATHWAYS
AND IDENTIFIED SUBSTANCES**

One of the key steps in preparing a public health assessment is to identify all completed exposure pathways at a site. A completed exposure pathway consists of the following five elements:

- ☐ Source of contamination
- ☐ Environmental medium
- ☐ Point of exposure
- ☐ Route(s) of exposure
- ☐ Receptor population (ATSDR, 1992a)

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Receptor populations include community residents and any relevant worker populations. All five elements must be present for a pathway to be considered as completed. It merits emphasizing that sites with completed exposure pathways represent those sites with greatest public health concern because human populations are known to be exposed to substances released from the site.

An ATSDR evaluation of contamination data in HazDat for 1309 sites through December 1994 showed that completed exposure pathways were identified at 513 sites (39%). However, about 60% of NPL sites assessed by ATSDR in fiscal years 1993 and 1994 were found to have completed exposure pathways. The increase in percentage of sites with exposure pathways is due to earlier involvement by ATSDR and improved environmental databases. At 91% of the sites with completed exposure pathways, the exposure occurred through contaminated groundwater, at 46% of the sites exposure occurred from contaminated soil, at 14% of the sites exposure was via contaminated biota. However, these contamination data need to be understood in the context of how they are collected by EPA. When HWS are evaluated, the soil and groundwater are almost always sampled; however, for cost containment reasons, air monitoring and sampling of biota are usually conducted only if there is evidence that the contaminants in these media are likely to be of health import.

The foregoing statistical data, drawn from ATSDR's HazDat data system, for sites with completed exposure pathways led to the following statement to Congress (Johnson, 1995a):

From about 1309 sites assessed by ATSDR from 1987 through December 1994, completed exposure pathways (i.e., people were in the path of substances released from sites) were identified at about 40% of sites. About 60% of EPA National Priorities List (NPL) sites assessed by ATSDR in fiscal years 1993 and 1994 were found to have completed exposure pathways.

Table 1 lists the 10 contaminants most often found in completed exposure pathways at 1356² sites addressed in public health assessments and the percentage of sites at which each substance was released. These data correct a previous publication (Johnson, 1995b). Data on which substances are found in completed exposure pathways are used by ATSDR for several purposes. These include developing toxicologic information databases, determining health investigations, focusing toxicologic research, and refining the agency's list of priority hazardous substances.

Chemical Mixtures

HWS typically contain a mix of hazardous substances. Data in HazDat confirm that a hundred or more different substances can be found at a single waste site. These substances are found in widely varying combinations in water, soil, and air, and some of the combinations might be much more hazardous than any single substance released alone. Table 2 lists the top binary combinations of contaminants in groundwater and surface water, based on data in HazDat from 1188 HWS. Similar information is available for releases into soil and air (Johnson and DeRosa, 1995). This kind of information about chemical mixtures is useful in the conduct of site-specific risk assessments and public health assessments, and for designing human epidemiological investigations and toxicological studies.

²Of the 1356 sites, 1306 are current or former NPL sites, and 50 are non-NPL sites for which ATSDR was petitioned to conduct public health assessments.

TABLE 2. Top 10 Binary Combinations of Contaminants in Water at Hazardous Waste Sites¹

No. Sites	Contaminant 1	Contaminant 2
279	Tetrachloroethylene	Trichloroethylene
225	Chromium	Lead
213	1,1,1- Trichloroethane	Trichloroethylene
206	Lead	Trichloroethylene
204	Cadmium	Lead
202	Benzene	Trichloroethylene
194	Arsenic	Lead
172	1,2- Dichloroethene, trans	Trichloroethylene
161	Toluene	Trichloroethylene
160	Benzene	Lead

¹Johnson and DeRosa, 1995.**HAZARD TO HUMAN HEALTH**

The hazard presented to the public by HWS is a complex issue that requires examining each site on its own characteristics. Any examination must consider the extent of environmental contamination and possible contact with human populations, the toxicology of released substances, and the nature and extent of potentially exposed vulnerable populations (e.g., children, pregnant women). Concerning the number of persons at potential risk of exposure to substances released from NPL sites, based on demographic data available in the 1980s, EPA estimated that approximately 41 million persons lived within 4-mile radii of the 1134 NPL sites at that time (NRC, 1991). Of course, residence near a HWS does not necessarily translate to actual exposure to substances released from the site.

Researchers at ATSDR used a Geographic Information System (GIS) approach to assess the demographics of populations residing near NPL sites (Heitgerd et al., 1995). GIS is a powerful tool that permits analysis of datasets overlaid on a geographic database. For example, census data can be overlaid on a geographic base to determine housing patterns according to race or income

The investigators found approximately 11 million persons living within 1-mile buffers of the 1200 NPL sites assessed. Concerning race and ethnicity, results revealed a statistically significant elevation ($p \leq 0.001$) in the mean percentage for each racial group and persons of Hispanic origin in the population living within 1 mile of a site than in the remainder of the county when controlled for state and county of NPL site. The largest percentage difference was found for African-Americans. They represented 8.3% of the comparison area but 9.4% of the population residing within 1 mile of NPL sites.

The Heitgerd et al. findings add to the body of information suggesting that socioeconomic disadvantaged populations and some minority groups are disproportionately located in areas near HWS (Heitgerd et al., 1995). These findings have raised questions in the United States about the unfair imposition of environmental hazards on minority and disadvantaged groups. These concerns are framed in what is called environmental justice issues (Sexton et al., 1993).

Health Hazard Categories

The threat posed by individual HWS is classified in ATSDR's public health assessments according to the following 6 categories of health hazard:

- ☐ Urgent public health hazard-sites that pose an urgent public health hazard as the result of short-term exposures to hazardous substances.
- ☐ Public health hazard-sites that pose a public health hazard as the result of long-term exposures to hazardous substances.
- ☐ Indeterminate public health hazard-sites with incomplete information
- ☐ No apparent public health hazard-sites where human exposure to contaminated media is occurring or has occurred in the past, but exposure is below a level of health hazard.
- ☐ No public health hazard-sites that do not pose a public health hazard (ATSDR, 1992a).
- ☐ Unclassified-sites with inadequate data to make a site categorization possible

A site is assigned one of these categories on the basis of professional judgment, using weight-of-evidence criteria; the assignments are not risk-based derivations (ATSDR, 1992a). ATSDR's site categories differ from EPA's Hazard Ranking System for the same sites (NRC, 1994). For example, EPA's ranking scheme takes into account ecological effects and environmental hazard; ATSDR's scheme focuses solely on human health impact. Classifying sites by human health hazard enables ATSDR to direct program resources and effort to those sites thought to present the greatest hazard to public health. ATSDR's hazard categories are used by some EPA regions to refine their priorities for site remediation.

Table 3 compares the categories of hazard described in 1719 public health assessments completed by ATSDR through September 1994, as well as those completed in fiscal years 1992, 1993, and 1994. The number of public health assessments exceeds the number of waste sites assessed because some sites have had updated assessments when new environmental or health data became available

TABLE 3. Percentage of Sites Classified into ATSDR Hazard Categories by Public Health Assessments (PHAs)

Category	All PHAs* (n = 1,719)	FY 92 (n = 233)	FY 93-94* (n = 136)
Urgent Hazard	2	2	5
Health Hazard	21	35	49
Intermediate Hazard	65	41	34
No Apparent Hazard	8	20	10
No Hazard	3	2	2
Unclassified	1	0	0

*Data reflect the status of the PHA documents, January 1995.

The percentage of HWS that ATSDR has categorized as Urgent Public Health Hazards or Public Health Hazards has increased over time. Historically, 23% of all sites for which ATSDR has conducted public health assessments represented a health hazard, according to ATSDR's classification, though considerable caution must be exercised in citing this statement. An increasing percentage of sites were categorized as health hazards after 1990, when more extensive environmental contamination data from EPA and human health data from state health departments became more available to ATSDR. Additionally, EPA made improvements in its Hazard Ranking System (NRC, 1994), and ATSDR developed the capacity to investigate sites earlier, after their proposed placement by EPA on the NPL. In 1993 and 1994, ATSDR considered that 54% of sites posed potential hazards to human health (Table 3). It is important to note that actual hazard to health must be established by site-specific epidemiologic or other investigation.

The foregoing statistical data, drawn from ATSDR's HazDat data system, for sites with completed health assessments, led to the following statement to Congress (Johnson, 1995a):

Of 136 sites for which public health assessments were conducted and advisories were issued in fiscal years 1993 and 1994, ATSDR classified 54% as health hazards. Historically, 23% of 1719 public health assessments for more than 1300 Superfund sites represented health hazards, by ATSDR's public health assessment criteria.

Each public health assessment of an HWS includes review by an ATSDR multidisciplinary team of physicians, toxicologists, engineers, health educators, and epidemiologists. Using each HWS health assessment, three categories of public health recommendations are developed and, where appropriate, made part of a site's final public health assessment report. A review of these recommendations is instructive in terms of overall hazard posed by HWS.

First, using the data in HazDat, a review of the recommendations in the public health assessments provided by ATSDR to EPA and states indicates that about 60% of the assessments include recommendations to interdict or reduce current, ongoing exposure pathways. These recommendations can include relocation of community residents (rare), provision of alternate drinking water, issuance of fish consumption advisories, posting of warning notices, or restriction of access to the site. Second, at approximately 65% of sites, follow-up public health actions were indicated. Of these actions, 54% pertained to the need to implement health education for communities and local health care providers; epidemiologic health investigations comprised 29% of the recommendations.

HEALTH IMPACTS OF SUPERFUND SITES

Many epidemiologic studies have been conducted to investigate health effects in communities around HWS. Many of these studies are negative in the sense that statistically significant increases in adverse health effects were not found (NRC, 1991; Grisham, 1986; Upton et al., 1989). Although these findings may represent the true health status of the communities because there was limited or no exposure to hazardous substances, "negative" or equivocal findings can be due to inadequately designed epidemiological investigations (e.g. Morgenstern, 1982; Neutra et al.,

1991). Negative or equivocal findings can be a consequence of study sample size that was too small, inadequate information about the level of exposure to hazardous substances, misclassification of study participants, poor selection of sites studied, or inappropriate health effects studied for the toxicology of the specific substances found at a given waste site. Some of these limitations can be reduced through improved exposure assessment and sometimes by combining sites for study (ATSDR, 1992b). Similarly, "positive" findings in health investigations can erroneously occur from misclassification of study participants, inadequate exposure data, inappropriate choice of comparison data or groups, and errors in statistical analysis.

The NRC conducted a comprehensive review of the published literature on public health implications of hazardous waste (NRC, 1991). The review concluded:

In spite of the complex limitations of epidemiologic studies of hazardous-waste sites, several investigations at specific sites have documented a variety of symptoms of ill health in exposed persons, including low birthweight, cardiac anomalies, headache, fatigue, and a constellation of neurobehavioral problems. It is less clear whether outcomes with a long delay between exposure and disease also have occurred, because of complex methodological problems in assessing these outcomes. However, some studies have detected excesses of cancer in residents exposed to compounds, such as those that occur at hazardous-waste sites.

The NRC concluded that the overall impact of hazardous wastes in the U.S. environment is unknown because of limitations in identifying, assessing, or ranking HWS exposures and their potential effects on public health. The NRC recommended additional resources and effort be directed to conduct more epidemiologic investigations of communities around HWS.

However, an earlier review (Grisham, 1986) concluded that little evidence existed to support the proposition that chemical wastes were adversely affecting the health of communities. It is not possible here to reconcile these two differing views, other than to note that the reports were prepared 5 years apart and by different persons. A comprehensive review of this literature is found elsewhere (NRC, 1991; Grisham, 1986; Upton et al., 1989).

However, to give a contemporary perspective on the overall health significance of HWS, some studies conducted subsequent to the cited reports have import. In particular, a number of investigators have conducted epidemiologic studies of cancer rates or prevalence of adverse reproductive effects in ways that combine uncontrolled hazardous waste sites or by examining large health effects databases. These studies are described in the following sections.

Cancer Mortality

Two sets of investigators have reported an increased frequency of cancers in counties containing HWS. A 1983 study reported that age-adjusted gastrointestinal (GI) cancer mortality rates (all anatomic sites combined) were higher in 20 of New Jersey's 21 counties than national rates (Najem et al., 1983). Within specific sex and race groups, cancer mortality rates in the state during the period 1968–1977 significantly exceeded national rates for cancers of the esophagus,

stomach, colon, and rectum. The environmental variables most frequently associated with GI cancer mortality rates were population density, degree of urbanization, and presence of toxic waste disposal sites (Najem et al., 1983). Similarly, a study was conducted of 593 HWS in 339 counties of 49 states, where analytic evidence showed contaminated groundwater was the sole source of water supply (Griffith et al., 1989). For each identified county, age-adjusted, site-specific cancer mortality rates for 13 major cancer sites (anatomic) were extracted from U.S. cancer mortality and trends for the period 1950–1979 for white males and females in the decade 1970–1979. Significant associations between excess deaths and all HWS counties, when compared to all non-HWS counties, were shown for cancers of the lung, bladder, esophagus, stomach, large intestine, and rectum for white males; and for cancers of the lung, breast, bladder, stomach, large intestine, and rectum for white females. Because there were no exposure data on populations at risk of exposure to HWS contaminant releases, the implications of these two studies are limited.

Reproductive Effects

Reproductive effects of hazardous substances released from hazardous waste sites is the area of health investigation most extensively documented. Several studies have examined associations between maternal residence near hazardous waste sites and the occurrence of birth defects, low birthweight, and other reproductive outcomes. These studies have used birth defects surveillance databases maintained by some state health departments. Additionally, some site-specific studies have also been conducted.

A study examined the association between congenital malformations in children and maternal proximity to HWS in the state of New York (Geschwind et al., 1992). The study populations consisted of 9313 newborns with congenital malformations, as recorded in the New York State Congenital Malformations Registry, and 17 802 healthy comparison children. In 20 New York counties, 590 HWS were selected for analysis of the incidence of malformations. (Waste sites in New York City were excluded, given what were presumed to be unique sociodemographic and geographic characteristics compared to the rest of the state.) An “exposure risk index” was created for each respondent within a 1-mile radius of the birth residence. Through statistical analysis, the investigators controlled for several possible confounding variables, including maternal age, race, education, complications during pregnancy, birthweight, length of gestation, and sex of child. Other possible confounders, such as smoking and alcohol history, maternal and paternal occupational exposures, and maternal nutritional status, were not evaluated because of lack of data. Results indicated that maternal proximity to HWS may carry a small additional risk of approximately 12% of bearing children with congenital malformations. Higher malformation rates were associated with both a higher exposure risk (63% increase in risk) and documentation of off-site chemical leaks (17% increased risk).

As a follow-up to the Geschwind et al. study, investigators evaluated the risk of two types of birth defects (central nervous system [CNS] and musculoskeletal [MUS] defects) associated with mothers’ potential exposure to solvents, metals, and pesticides through residence near hazardous waste sites (Marshall et al., 1995). Subjects were drawn from births occurring in 1983–1986 to residents of 18 urban counties in New York State, excluding New York City. Cases were drawn from the Congenital Malformations Registry and controls were drawn from those

included in the Geschwind et al. study. Potential residential exposure was based on the address at birth. Environmental data on all inactive hazardous waste sites ($n = 643$) were assessed. Areas within one mile of each site were classified according to the probability of exposure. The environmental ratings for 473 CNS cases, 3305 MUS cases, and 12 436 controls were combined with data on other potential risk factors for birth defects as obtained from birth certificates, such as mother's age, race, and education level.

Results from the study showed mothers residing in areas classified as having a medium or high probability of exposure to substances from HWS did not show an increased risk of either CNS or MUS birth defects in their offspring when compared to mothers residing in low probability exposure areas (Marshall et al., 1995). The low number of persons classified in the medium and high probability of exposure categories limit this study. Further efforts are needed to elaborate the differences between the Geschwind et al. and Marshall et al. studies.

Researchers examined birth defects and birthweight in the five-county San Francisco Bay area in California (Shaw et al., 1993). The investigators reviewed case records of congenital malformations and birthweights of all live births and fetal deaths that occurred from 1983–1985. From a total of 215 820 live births, 5046 children with congenital malformations were identified. Birthweights of 190 400 children were also analyzed. Each mother's census tract of residence at time of delivery was used to categorize exposure potential. Each census tract was categorized into 1 of 3 groups, according to the presence or absence of sites of environmental contamination (landfills, chemical dumps, industrial sites, hazardous materials treatment and storage facilities) and whether information was available about potential human exposure to released contaminants. An elevated risk (odds ratio: 1.5) for infants with malformations of the heart and circulatory system was found in census tracts with sites having potential for exposure; no similar risk was found in census tracts with no sites. No increased risk was found for other malformations or for low birthweight.

In a follow-up to the California birth defects surveillance study (Shaw et al., 1993), a case-control study was conducted by Croen that focused on three specific birth defects: neural tube defects, conotruncal heart defects, and cleft palate defects (Croen, 1995). The primary purpose of the study was to examine the association between birth defects and residential exposure to substances released from waste sites. A total of 764 sites was examined, including 105 NPL sites and 334 sites operating under the conditions of the RCRA. The remainder of the sites were California-designated hazardous waste sites or facilities. Cases and controls were ascertained by the California Birth Defects Monitoring Program. Controls were randomly selected from the cohort of live births corresponding to the same time period and geographic area from which the birth defect cases derived. The following number of total cases of birth defects and controls were evaluated: neural tube defects (507 and 517 controls), conotruncal heart defects (201 and 455 controls), and oral cleft palate defects (439 and 455 controls). Croen used questionnaire data to adjust for potential confounders, such as maternal race/ethnicity, age, education, family income, alcohol use, vitamin use, cigarette smoking, and employment status. The primary finding was:

In this investigation of residential proximity to hazardous waste sites and risk for selected congenital malformation, moderately increased risks were observed for neural tube defects and conotruncal heart defects in association with maternal early pregnancy residence within 1/4 mile of any hazardous waste site, and within one mile of a National Priority (sic) List site. (Croen, 1995).

No increased risks were observed for oral cleft defects in association with maternal residential proximity to a hazardous waste site.

In a study of NPL sites nationally, very low birthweight, infant and fetal death, prematurity of birth, and congenital malformations were not associated with living within a 1-mile radius of NPL sites during pregnancy (Sosniak et al., 1994). The investigators examined reproductive outcomes reported in a 1988 national database and compared the occurrences of adverse outcomes with mothers' residence during pregnancy, using maternal ZIP codes as a surrogate for exposure to any releases from sites. The NPL database was derived from EPA records for 1990. Possible confounding variables that account for adverse reproductive outcomes, for example, smoking history and quality of prenatal care, were examined by submitting questionnaires to mothers represented in the database. The lack of association between maternal proximity to NPL sites nationwide and adverse reproductive outcomes is tempered by the lack of actual exposure information during pregnancy in this study, as well as in the other reports cited in this section.

Three site-specific studies of reproductive outcomes in populations impacted by releases from hazardous waste sites have contributed to ATSDR's findings as reported to Congress. Paigen et al. (1987) compared 493 children living near a hazardous waste in Love Canal, New York, to 428 children living in matched census tracts. Anthropometric measures of children, height of parents, demographics, and health information were compared for the two groups. Children born and spending at least 75% of their lives in the Love Canal area had significantly shorter stature for age than did comparison children. The observed difference in stature was not associated with parental factors, socioeconomic status, birthweight, or chronic illness (Paigen et al., 1987).

Birthweights of infants born to mothers living near the Lipari Landfill NPL site in New Jersey were examined by the New Jersey State Health Department (Berry, 1994). Birthweights were grouped into 5-year periods from 1961–1985. For this time span, birthweights for 2767 births with gestational age greater than 27 weeks were compared with 7389 comparison births. Birthweights for 2563 term births (gestational ages between 37 and 44 weeks) were compared with 6840 comparison births. Births were assigned an exposure area based on distance to the mother's residence from the landfill at time of birth. Residents living within 1 kilometer of the site were defined as "exposed" Births in towns near the Lipari Landfill but greater than 1 km constituted the comparison group. The area nearest the landfill was divided into two subdivisions based on proximity to the landfill. Significantly lower average birthweights (80–152 g) for births with gestational age greater than 27 weeks occurred for the years 1971–1975 compared with births from the comparison area. Term births showed a significant reduction of 188 grams between years 1966–1975. The investigators noted that the birthweight reductions occurred only during the period 1971–1975, when the peak releases of substances from the landfill were occurring. No biological exposure levels of contaminants were available for the study populations.

In the third site-specific study, Goldberg et al. investigated the association between congenital cardiac malformations and parental contact with drinking water in Tucson, Arizona, contaminated for several years, primarily with trichloroethylene (Goldberg et al., 1990). Using their own case registry, they identified 707 children with congenital heart disease born between 1969 and 1987, who were conceived in the Tucson Valley, and whose parents spent the month before the first trimester and the first trimester of the case pregnancy in the Tucson Valley. Of the 707 cases, 246 resided in the area with contaminated water. The remaining 461 cases served as a case comparison group. Findings showed the odds ratio for congenital heart disease in children whose parents had contact with the contaminated water area during the period of active contamination was three times that of the comparison cohort ($p < 0.005$).

The evidence of adverse reproductive effects in the preceding studies bearing on cancer and adverse reproductive outcomes led to the following statement to Congress (Johnson, 1995a):

Although epidemiologic findings are still unfolding, when evaluated in aggregate (i.e., by combining health data from many Superfund sites), proximity to hazardous waste sites seems to be associated with a small to moderate increased risk of some kinds of birth defects and, less well documented, some specific cancers.

Chronic Disease Morbidity

In addition to the data previously described on cancer mortality and adverse reproductive effects, ATSDR's National Exposure Registry (NER) (Gist et al., 1994; Gist and Burg 1995) has reported findings on noncancer chronic disease morbidity of relevance to the impact of hazardous waste sites on human health. The NER consists of subregistries of persons having documented exposure to substances of priority to ATSDR and for which there are gaps in information about the substance's toxicity. The subregistry of persons exposed to trichloroethylene (TCE) as a contaminant in private well water consists of 4280 persons located in 13 sites in Indiana, Illinois, and Michigan (Burg et al., 1995). The levels of TCE varied from site to site as did the levels and numbers of co-contaminants. However, TCE was considered by ATSDR as the primary contaminant across all 13 sites. The duration of registrants' exposure to TCE varied from months to several years. It is important to note that exposure to TCE had ceased for all of the registrants when they were provided with an alternative water supply, in most cases, a municipal water system.

Using a structured questionnaire, TCE registrants are surveyed periodically on an ongoing basis to obtain their self-reported health status. Respondents' health status is compared to responses in the National Health Interview Survey (NHIS), which is a population-based survey of the U.S. population conducted annually. Four demographic characteristics—sex, age, race, and education level—are considered in the NHIS and TCE Subregistry comparisons. The samples were comparable, except for race; the TCE Subregistry has fewer persons from minority groups. Therefore, statistical analyses were based only on data from 3914 white respondents. National Household Survey on Drug Abuse data were used to compare respondents' tobacco smoking rates with national norms. When compared with the NHIS population, the TCE Subregistry population had a higher rate of reported adverse health outcomes. For adults this included stroke,

liver disease, diabetes, anemia and other blood disorders, kidney disease, urinary tract disorders, and skin rashes. Children in the TCE Subregistry population reported elevated rates of hearing impairment and speech impairment (Burg et al., 1995).

These results on TCE do not identify a causal relationship between TCE exposure and adverse health effects; more definitive epidemiological investigations will be required. However, because many of the chronic health problems reported by the TCE registrants seem to have toxicologic plausibility (Burg et al., 1995), these morbidity data have serious implications concerning any association between long-term, low-level exposure to TCE and impacts on human health.

The findings from ATSDR's TCE exposure registry, together with the knowledge that some toxicants (e.g., lead and dioxin) remain in body tissues long after exposure to them has ceased, led to the following statement to Congress (Johnson, 1995a):

Site remediation doesn't necessarily resolve all public health concerns. An increasing body of scientific evidence indicates that past exposures to hazardous substances can cause latent adverse health effects. These findings highlight the need for continuing surveillance of populations exposed to hazard substances.

EMERGENCY EVENT SURVEILLANCE

In addition to substances released from uncontrolled hazardous waste sites, unplanned releases of substances that lead to emergency responses constitute a second kind of hazardous waste problem. Substances that are released into the environment when controlled industrial processes fail, or from transportation mishaps, represent a hazardous waste problem if one applies a broad definition to "waste." The consequences to human health of emergency chemical releases can be consequential, depending on the obvious factors of the released substance's toxicity, susceptibility of exposed populations, and duration of exposure. Generally, the public health implications of chemical emergencies are different from those posed by releases from hazardous waste sites. In the former, acute exposure and short-term health effects are the primary concern; for the latter, chronic, generally low-level exposures predominate and the primary concern is for any chronic adverse health effects.

Knowledge of the frequency and nature of unplanned chemical releases that lead to emergency response is important for planning and prevention purposes. For example, emergency response personnel find surveillance-based data on which substances are most frequently released very useful. In 1990 ATSDR initiated the Hazardous Substances Emergency Events Surveillance (HSEES) system as an active surveillance program with five state health departments (Hall et al., 1994, 1995). Each department actively seeks emergency event information from other state agencies and local departments within the state. Since 1990 the HSEES system maintained by ATSDR has grown to include 14 states³.

³Alabama, Colorado, Iowa, Minnesota, Mississippi, Missouri, North Carolina, New Hampshire, New York, Oregon, Rhode Island, Texas, Washington, Wisconsin. Minnesota and Mississippi are not included in the 1994 database.

Beginning January 1, 1993, hazardous substance emergency events are defined by ATSDR as uncontrolled or illegal releases or threatened releases of hazardous substances or the hazardous by-products of substances. Not included are events involving petroleum products exclusively (ATSDR, 1995). Events are included in HSEES when the amount of substance released, or that might have been released, need (or would have needed) to be removed, cleaned up, or neutralized according to federal, state, or local law; or when there was only a threatened release of a substance, but this threat led to an action (e.g., evaluation) that could have affected the health of employees, responders, or the general public. Victims are defined as those individuals who suffered at least one injury, or died, as a consequence of the event (Division of Health Studies, 1995).

The 12 states (see footnote) participating in 1994 in the HSEES system reported a total of 4244 events, with 79% of the events occurring at fixed facilities and 21% of events being transportation related (ATSDR, 1995). Only 17% of events occurred during the weekend. In 90% of events only a single substance was released; most commonly released were "Volatile Organic Compounds" (19% of events), "Other Inorganic Substances" (16%), and "Acids" (10%). Of the 4244 events, 414 events⁴ resulted in a total of 2178 victims. There were 20 deaths in the 4244 events, and 574 events led to evacuation of people. Of the 20 deaths, 8 persons died in fixed-facility events, and 12 persons died in transportation events. Victims according to population group showed employees (45%), general public (44%), and responders (11%) to be the groups most often injured.

These surveillance system data indicate the health impact of hazardous waste releases extends to plant employees, responders, and the general public during times of emergency chemical releases.

HEALTH AND SAFETY OF WORKERS

Hazardous waste sites and emergency releases of toxic substances have the potential to cause adverse health effects in community populations. However, in addition to community groups, other persons also are at possible health risk due to exposure to substances in hazardous waste. In particular, there are safety and health implications for workers whose occupations place them in direct contact with waste sites or waste management facilities. Included in these categories would be waste site remediation workers and workers who dispose of hazardous wastes, for example, incineration workers.

Remediation Workers

As an industry, remediation of hazardous waste sites is relatively new in the United States, but one that involves large numbers of workers. The precise number of waste site remediation workers is unknown, but some reasonable estimates of the workforce are available. One source used labor demand models that estimate the kinds of skills needed to implement the various stages of a remedial response (site characterization, design, and cleanup) (Warhit, 1995). Drawing upon DOE- and DOD-site remediation cost estimates, it was estimated that the number of professional workers involved in remediating DOD and DOE uncontrolled waste sites currently approximate 86 000 persons in fiscal year 1995 and will increase to approximately 111 000 workers in fiscal year 1998 (Warhit, 1995). Included in these figures are engineers, scientists, managers, and technicians.

⁴Note: Hall et al. (1994) incorrectly state 415 events.

The demand for craft labor at federal sites is estimated to be about 131 000 full-time workers in fiscal year 1995, declining to about 92 000 craft laborers in fiscal year 1998 (Warhit, 1995). For non-federal waste sites, the labor demand is estimated to be about 84 000 craft laborers in fiscal year 1995. There are many assumptions underlying these workforce estimates. A key assumption is that current remediation procedures and technologies will be characteristic of those used in the future. As cost containment concerns mount, it is likely that site remediation methods and technologies will change, hence changing the mix and number of remediation workers—both professionals and craft labor. The number of craft laborers is particularly important for purposes of health risk, given that they have the greatest day- to-day contact with sites and the substances contained in the sites.

Health effects of site remediation work. Care must be exercised that the workers who remediate (i.e., cleanup) the sites are not harmed by their work. The removal of soil or water contaminated with toxic substances clearly presents the potential for adversely affecting the health of cleanup workers if the necessary precautions are not taken. Work conditions can involve toxic chemicals, biologic hazards, radiation, heavy work loads, and heat or cold stress. Primary protective measures include personal protective equipment, engineering controls, site monitoring equipment, and training and education of workers. Secondary protection measures include periodic medical evaluations of remediation workers and a program of workers' health surveillance. An adequate program of worker health protection requires both primary and secondary measures.

No data to date indicate any adverse health effects in HWS remediation workers. However, there is now a surveillance program among ATSDR, the Laborers International Union of North America, and contractors, to follow the health of remediation workers. In general, physicians and others need to have more information about toxic substances and what to do about environmental health problems experienced by site remediation workers.

Occupational risk studies. In addition to potential adverse health effects due to site remediation work, traumatic injuries must also be a concern. Site remediation work can involve the extensive use of heavy equipment, manual labor, and movement of materials. These factors, as others, present potential hazards to workers. The safety implications of site remediation work has led to a limited amount of research on estimating the level of risk.

One group of researchers estimated the risk of occupational fatalities associated with hazardous waste site remediation (Hoskin et al., 1994). Acute traumatic fatality risks for workers in three kinds of site remediation were assessed. Hoskin et al. (1994) were interested in assessing the level of risk of fatalities in comparison to the level of risk associated with actions intended to protect against adverse health risks. More specifically, government regulatory actions typically target a residual cancer risk of 10^{-6} . How does the risk of fatal traumatic injury compare? The researchers argue that knowing this level of safety risk would permit incorporating quantitative risk estimates into site remediation plans, thereby improving the level of protection afforded to cleanup workers.

Hoskin et al. (1994) compiled occupational employment and fatality data for the years 1979–1981 and 1983 from Bureau of Labor Statistics for 11 states. These data were analyzed for 17 occupations known to be associated with three common remediation alternatives: excavation and landfill, capping, and capping plus slurry wall. The occupations included truck driver, laborer, manager, operating engineer, secretary, and others. Assumptions were made about the extent of remediation required under each of the three remediation technologies and the hours of labor required per each occupation. The expected number of fatalities was converted, using the Poisson distribution, to the risk of experiencing at least one fatality during remediation.

The excavation and landfill remediation method was found to be the most labor intensive. The most hazardous occupation in this method was that of truck driver, followed in order by laborer, oiler, and dozer operator. Capping only and capping plus slurry wall were both less labor intensive than excavation and landfill. For both these alternatives, truck drivers and laborers were the occupations with greatest risk. Overall, the risk of experiencing at least one fatality during remediation was calculated to be 14.9×10^{-2} (0.149) for excavation and landfill, capping, and 1.4×10^{-2} for capping plus slurry wall. Hoskin et al. (1994) observed: The fatality risks to workers engaged in remediation, 10^{-1} to 10^{-2} as found here, are orders of magnitude greater than the 10^{-6} human cancer risk criterion often used in association with remediation risk discussions.

The Hoskin et al. (1994) study also points out that fatality risks vary according to the method of remediation chosen. Less labor intensive remedial methods represent smaller fatality risk to workers. These findings are important in terms of factoring human safety risk into site remedial designs. The study's findings are hampered to some extent by limitations inherent in the databases analyzed. Only occupational data from 11 states were evaluated and the data could not be current-year data because of limitations in occupational codes in U.S. Census data.

In another study, Travis and Hester (1991) developed a method for estimating worker risk occurring during remediation of radioactively contaminated sites. This work was conducted in support of the DOE's program to remediate hazardous waste at their facilities. The facilities were part of the nuclear weapons production complex in the United States. The researchers characterized removal workers' risk associated with remediation activities at 17 DOE sites. The sites contained radiologic contaminants as well as chemical contaminants.

The method for assessing risk to remedial workers encompassed two elements: radiologic risk and construction- and transportation-related risk. Exposure to chemicals was not included in the risk analysis. Fatal cancer risks were estimated separately for exposure from direct radiation and inhalation of radionuclides. For each of the 17 sites, three different remediation options were evaluated. The remediation alternatives differed according to site. Using site-specific data, radiation exposure rate estimates were calculated and doses estimated. For construction and transportation risks, Bureau of Labor Statistics data on fatalities from construction accidents and transportation mishaps were used. Only off-site transportation fatality rates were considered in the analysis.

Results from Travis and Hester (1991) are presented as fatality risk for direct radiation exposure, inhalation exposure of radionuclides, general construction, and off-site transportation. The ranges of the estimated risk for these four work hazards were: 1×10^{-13} to 8×10^{-2} , 2×10^{-12} to 8×10^{-2} , 2×10^{-4} to 6×10^{-1} , 2×10^{-6} to 2×10^{-1} , respectively. The authors conclude: "Radiation-induced cancer fatalities from direct radiation and inhalation of radionuclides are on the average 9 times lower than fatality risk from construction and transportation accidents." They further concluded, however, that radiation doses were high, warranting stringent worker protection measures. The data in their paper do not permit any generalizations about the kind of remediation alternatives that pose greatest risk to workers. However, the data do make clear that the risk (radiation and construction/transportation) posed to workers varies according to site conditions and remediation alternative selected.

These two studies are important in the sense that waste site remediation presents quantifiable fatality risk to workers that depends on the choice of site remediation selected. Construction labor and transportation activities rank high for risk fatality for remediation workers.

Waste Disposal Workers

In addition to waste site remediation work, the permitted disposal of hazardous waste by incineration, on-site destruction, or other permitted method of disposal can bring workers into contact with hazardous substances. Without adequate safeguards and work practices, workers' exposure to the wastes could lead to adverse health effects. Although occupational health literature on the subject is not extensive, the following studies illustrate some of the hazards to the health of waste disposal workers.

In Sweden, mortality was investigated among 176 male workers employed for at least 1 year between 1920 and 1985 at a municipal waste incinerator (Gustavsson, 1989). An excess of deaths from ischemic heart disease was associated with duration of work. Exposure to combustion products and polycyclic aromatic compounds was common. In a study of 14 incineration workers at a solvents disposal facility in the United States, investigators found severe neurologic damage (myoclonus and severe tremor) in two workers, and all workers had abnormal psychiatric symptoms, but with different diagnoses (Kawamoto, 1992). In Poland, dermatologic examinations were conducted on 393 workers whose work required contact with waste volatile ashes in electric power stations. Eczema was found in 18% of workers, and hypersensitivity to chromium was noted in 21% (Kiec-Swierczynska, 1989). In Japan, workers' exposure to organic solvents was investigated at 35 waste water disposal facilities where liquid waste was incinerated. Workers' exposure to all solvents exceeded acceptable threshold limit values. Exposures were greatest in incineration areas (Ikatsu et al., 1989). Mexican landfill workers were evaluated for uptake of hazardous substances and adverse health effects. Twenty-two workers whose duties required handling hazardous wastes were compared to manual laborers from an adjacent community. Landfill workers used no protective measures or equipment; they had elevated levels of arsenic in urine and hair, but other metals were not elevated in biological samples. No patterns of adverse health effects were found, which is not surprising given the newness of the landfill operations (Diaz-Barriga et al., 1993). In Nigeria, macrocytic anemia and leucopenia were noted in workers who had contact with radioactive waste when compared with workers not similarly exposed (Ogunrati, 1989).

It is apparent that work that brings workers into contact with hazardous wastes has the potential to cause adverse health effects and safety risk if adequate safeguards are not taken. Work practices should be used that prevent direct contact with hazardous materials, and protective equipment must be provided to workers and used. Programs of medical monitoring and health surveillance should also be implemented if chronic health effects and injuries are to be prevented.

CONCLUSION

Although the national extent in the United States of the impact of HWS is difficult to assess and lacks consensus on the precise level of hazard, information provided in this paper indicates 54% of NPL sites assessed in 1993 and 1994 present a hazard to human health, using ATSDR's site hazard categories. Further, about 60% of all sites examined by ATSDR in 1993 and 1994 evidence completed environmental pathways, which by definition is a basis for health concern. Adding to the concern for human exposure to substances released from some sites, about 60% of the site health assessments indicate the need for interdicting or reducing on-going exposures. Findings from epidemiologic studies of cancer rates and prevalence of adverse reproductive outcomes associate a small to medium increased risk due to HWS when considered in the aggregate. However, the studies that underpin this assertion are severely limited in terms of human exposure information and possess other shortcomings.

Caution should be exercised in interpreting the implications of the health hazard percentages for HWS. In particular, these figures should not be used to argue for or against the extent of remediation of HWS. Data in this paper indicate that substances hazardous to human health are released from a significant number of HWS. Prudent public policy dictates that human exposures be prevented, and site remediation is consistent with reducing or preventing human exposures. Further, the health hazard percentages reported in this paper should not be understood to question the adequacy of the site identification and ranking scheme used by EPA to place sites on the NPL. EPA's ranking includes not only human health concerns, but ecologic and environmental degradation concerns as well.

The data described in this paper have led ATSDR to conclude the following:

- ☐ A significant percentage of HWS currently have completed exposure pathways.
- ☐ Toxicants released in environmental media have known toxic properties, but exposure and dose must be assessed at priority sites to determine health implications
- ☐ When aggregated, hazardous waste sites seem to be associated with some adverse health effects (particularly birth defects and perhaps some cancers).
- ☐ Each site is different and must be assessed as such
- ☐ Site remediation comports with health-risk reduction.
- ☐ Priorities for site remediation to reduce health risks should be set, to the maximum extent possible, by human-exposure data.
- ☐ Removal and remediation actions at Superfund sites will benefit from basic and applied science on the toxicity and human health effects of substances released from sites.

As efforts continue to identify and remediate HWS, it is prudent to consider each waste site as a potential source for the release of substances into the environment in ways that could adversely affect human health.

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Hazardous Waste Action Coalition
an association of engineering and science
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TESTIMONY FOR THE RECORD:

Senate Environment and Public Works Committee

September 15, 1997

SUBMITTED BY:

**THE HAZARDOUS WASTE ACTION COALITION (HWAC),
AN ASSOCIATION OF ENGINEERING AND
SCIENCE FIRMS PRACTICING IN MULTIMEDIA
ENVIRONMENTAL
MANAGEMENT AND REMEDIATION**



ACEC



Hazardous Waste Action Coalition

The Hazardous Waste Action Coalition (HWAC) greatly appreciates the opportunity to submit testimony for the record to be considered by the Senate Environment and Public Works Committee during deliberations on Superfund reauthorization.

HWAC is an association of over 75 of this country's leading engineering, science and construction firms practicing in multimedia environmental management and remediation. HWAC's members employ over 75,000 of this country's leading engineers, hydrologists, geologists, chemists, and other specialists trained in the science of hazardous waste cleanup. Our members are always searching for improved methods of hazardous waste management and cleanup to ensure development and implementation of today's solutions for tomorrow's hazardous waste problems.

HWAC member firms are on the front lines of hazardous waste cleanup. We are the firms hired to analyze the waste found at sites across the country, as well as recommend and implement site cleanup remedies. Our experience tells us that the present Superfund law is overly prescriptive and in serious need of improvement to allow our members to truly get on with the job at hand – cleaning up the hazardous waste sites that exist throughout the nation.

The Superfund Process

The current law contains prescriptive standards that must be met before you can move from one stage of cleanup to another. Hazardous waste cleanup strategy should be to clean up what can be addressed quickly, and plan for unknowns in the cleanup process to allow for quick responses to newly-discovered conditions uncovered in the course of a hazardous waste site investigation and cleanup. This essentially is an engineering technique called the "observational method," which has proven successful in many hazardous waste cleanups. What we know is that full site characterization that eliminates all project uncertainty prior to actual remediation is not possible. Waste migrates, and mixes with other constituents in the ground. Even with full statistical sampling, hot-spots can be missed. The observational method allows you to move between phases of hazardous waste cleanup and directly apply the knowledge that has been gained from each step in the process. The observational method was embodied in previous Superfund reauthorization legislation considered in both the House and the Senate. The current Senate bill has a similar orientation towards utilization of the observational method in cleanups. Only true legislative reform can ensure that this is implemented in all cleanups.

Everyone agrees that the cleanup and risk reduction process needs to be more streamlined, more flexible, more realistic, and based more on input from communities around the sites. Future land use considerations should be utilized in making cleanup decisions to ensure that scarce financial resources are spent wisely. Initiatives to test and



implement new, innovative technologies in cleanups must be accelerated. Finally, we need to make sure that we are employing sound engineering judgment in an effort to create solutions that protect public health and the environment, and conserve public dollars.

Despite these "lessons learned" and advanced technical capabilities, there has been a significant decrease in the contracting out of cleanup work for the past several years. This decline in hazardous waste cleanups throughout the can be directly attributed to the lack of a reauthorized Superfund law and the resulting uncertainties associated with a law that has expired. In addition, the shift from Fund-lead cleanups to enforcement-first cleanups has also contributed to the business slowdown. In many cases cleanups are not now occurring because of enforcement policies that discourage rather than promote environmental remediation by PRPs. The decline in work is well-documented, and has resulted in layoffs of thousands of trained, experienced hazardous waste professionals throughout the country, as well as decreased federal and state tax revenue from the firms whose cleanup businesses have been hurt from the decline in work. We need to get on with the job at hand using the technical capabilities for hazardous waste cleanups that have evolved over time.

Superfund's Liability Scheme and It's Impacts on Cleanup Firms

We all see the need to increase the resources devoted to cleanup and decrease the litigious atmosphere at hazardous waste sites. We need to focus on "fixing problems, not blame." The unfortunate result of the current Superfund liability scheme is that the law's strict, joint and several liability system results in potential liability for any party associated with a site, including the firms performing cleanup services at hazardous waste sites.

HWAC has been documenting the increase in cases that have been brought against cleanup firms. A summary of these lawsuits is attached. While these cases are all at various stages of the legal process, one overriding theme emerges -- the high cost of hazardous waste cleanup results in parties directly responsible for paying for cleanups looking for other "deep pockets" to share in the payments. The current law does not restrict lawsuits to parties that caused a problem.

One way to speed the pace of cleanups at a reduced cost is to protect the engineers, scientists and constructors who are retained to clean up sites from future lawsuits to share in or assume cleanup costs with the PRPs. HWAC is not advocating any specific, wholesale change to the Superfund liability system. It is up to Congress to decide how to readjust Superfund's overall Superfund liability system. HWAC is advocating, however, that the liability of cleanup firms in the overall Superfund liability scheme be clarified. In short, the cleanup firms believe the following:



- Cleanup firms should only be held liable to the extent of any damage that their actions may have caused.
- There should be a term of years within which their actions should be judged, which is in accordance with traditional engineering and construction law. Beyond a specific term of years after the cleanup work is performed, the PRPs should be responsible for site conditions.
- Cleanup firms should not be treated as site "operators, transporters, or generators" (as the lawsuits are alleging). These terms in Superfund are terms of art that refer to the PRPs, and should not be used to pull cleanup firms into the Superfund liability system without a demonstration of fault.
- Superfund Section 119's protections should be expanded to pull in the full range of sites and causes of action that the Senate is expecting to address under the provisions of the draft Chairman's Mark of S.8, and not be limited to merely NPL site cleanups and removal actions at sites where actual (but not threatened) releases occurred under federal law.
- Subcontractors and bonding firms should also be entitled to protections to ensure that Congressional efforts to address the liability of cleanup firms extend to the full range of parties involved in site cleanup activities.
- EPA should be encouraged to entertain risk sharing with its cleanup contractors if insurance is insufficient to protect against the unusual risks associated with a particular cleanup activity.

The lawsuit list attached demonstrates that the above requests are needed. An unintended result of the CERCLA liability scheme is to ensnare contractors and consultants attempting to solve problems. Many of these lawsuits are based on work performed ten or more years ago – work that was performed in accordance with our contracts, remediation technology and standards of practice current at that time and that may have met or exceeded client's expectations – and work that by now may not be covered by insurance. In addition, under current liability scheme, the potential risks often exceed the total project revenues to our firms, particularly for most site assessments performed by our many small business members.

The bills in these last three Congresses expressly recognized that those of us in engineering and construction have a critical role in site cleanups, and that the liability of the cleanup firms must be fairly limited to ensure a continued supply of qualified, experienced firms to perform cleanup activities. Language addressing the needs of cleanup firms is presently contained in Section 505 of the draft Chairman's Mark of S.8. Section 505 of the draft Chairman's Mark provides much-needed liability protections that will result in faster cleanups at a reduced cost to the taxpayer. Additionally, these protections will foster innovation in cleanups in order to uncover new technologies to



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better address the complexities associated with hazardous waste cleanup. Finally, Section 505 also provides that specific state standards governing the liability of cleanup firms take precedence over its provisions. HWAC urges members of the Senate to embrace the provisions of Section 505 as necessary to improving the operation of the overall Superfund program.

Contracting Approaches

There is a misconception about cleanups that must be addressed -- many believe that hazardous waste cleanup contracts are fixed-price jobs that embody a "cushion" to absorb any risk of loss experienced by the cleanup firm. This is not the case. No contractor could win a project on a price basis if his bid included a "risk" amount commensurate with the current statutes' liability pitfalls. The vast majority of cleanup contracts are "cost plus fee" contracts where the cleanup firm recovers its cost plus a mutually agreed-upon fee associated with the work. These contracts do not allow the contractor to build "risk" into the fee. Admittedly, some back-end remediation jobs are fixed-price contracts, but these jobs are primarily for work to be performed after the site is fully characterized and the remedy is selected and designed. Particularly in the federal contracts realm, post-contract audits would uncover any "cushion" that should not have been paid to the contractor. Additionally, fixed price remediation contracts have proven problematic when the actual remediation uncovers differing site conditions, requiring contract scope and fee changes. It should also be noted here that despite the views of some, fixed-price contracting does not guarantee delivery of a project result for a fixed price.

Performance-based contracting incorporates several contract vehicles, including fixed-price contracting, into a more appropriate approach to hazardous waste site cleanup contracting. The use of performance-based contracting is a potential "win-win" contracting approach for environmental restoration activities at Superfund sites. This approach addresses the need for multiple performance objectives, including cost control. Performance-based contracting places performance objectives, requirements and the associated metrics along with positive and negative performance incentives in the contract. Contract parties then establish a process for determining performance against a mutually-agreed standard. By focusing on results and applying the most appropriate contract vehicle in a given situation (fixed-price works best when uncertainty about site conditions and project scope are low, cost-plus is most appropriate when uncertainty is high), contracting under the Superfund program will benefit from efficiencies possible under a performance-based approach.



Hazardous Waste - Environmental

The Problem with ASTM Standards

The draft Chairman's Mark makes reference to a standard promulgated by the American Society for Testing and Materials (ASTM). This standard, ASTM Standard E1527-94, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," appears on its face to prescribe how to conduct a hazardous waste site investigation. However, the "standard" is in fact not a "standard" as the user would believe from the title. ASTM uses the word "standard" only to connote specific approval by an ASTM Committee. Furthermore, according to ASTM, following an ASTM "standard practice" does "not produce a test result." In other words, practitioners performing a site assessment on the same site following the ASTM "standard" may reach different conclusions.

Reliance on the professional judgment of hazardous waste professionals such as engineers, scientists, environmental consultants, and geologists (to name a few) is what is needed in cleanups to ensure faster cleanups that utilize innovative methods and technologies. Rigid reliance on a prescriptive "standard" will result in simple, cook-book efforts to follow the standard. It is a matter that is highly inappropriate for issues that beg for professional site-specific assessment. Adherence to a specific standard, in particular ASTM Standard E1527-94, will not ensure faster cleanups that protect the public and the environment while utilizing innovative technologies and analyzing cost/benefit considerations in making cleanup decisions. Moreover, the ASTM standard setting process is a secret, non-public process that is woefully short of the minimum public participation opportunities of normal rulemaking. Endorsing ASTM standards delivered by this process thereby flies in the face of the goal of meaningful public participation in the CERCLA process. HWAC strongly urges this Committee to reject the ASTM standard in favor of the professional judgment of trained hazardous waste professionals. A letter to Senator Chafee and Senator Smith signed by numerous organizations representing hundreds of thousands of hazardous waste professionals across the country is attached. This letter makes the same request -- please remove references to ASTM Standard E1527-94 from the Chairman's Mark and instead rely on the professional judgment of practitioners in the field.

Superfund Reauthorization Needed Now

Everyone in Congress agrees that cleanups need to be accelerated and accomplished at lower cost. True legislative reform is needed to make this happen. In many important areas, there is agreement between the Congressional Republicans and the Democrats, and the Administration. We encourage you to continue your hard work towards achieving true reform and enact comprehensive Superfund legislation this year.



Hazardous Waste Action Coalition

ATTACHMENTS

- (1) Summary of Litigation Involving Contractors and Hazardous Waste Cleanup
- (2) Letter from the Advocates for Professional Judgment in Geoprofessional Practice on
References to ASTM in S.8

**LITIGATION INVOLVING CONTRACTORS
AND
HAZARDOUS WASTE CLEANUP**

Summary of Significant Cases

Prepare by John E. Daniel - Morgan, Lewis & Bockius LLP,
Counsel to the Hazardous Waste Action Coalition

CERCLA Strict Liability Against Contractors

- Tanglewood East Homeowners (Texas - 1988): Residential construction company that had filled and graded creosote contaminated site in 1973 held to be subject to CERCLA liability for "treatment" and "transportation." Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988).
- Danella (Missouri - 1991): Utility contractor that unknowingly excavated and transported dioxin-contaminated dirt was held to be a "responsible party" under CERCLA but was not allocated liability for contribution since it had no responsibility to determine if soil was contaminated. Danella Southwest, Inc. v. Southwestern Bell, 775 F. Supp. 1227 (E.D. Mo. 1991), *aff'd* 978 F.2d 1263 (8th Cir. 1992).
- Catellus (California - 1992): Grading contractor that unknowingly moved contaminated soil around a construction site was held to be an "operator" of facility and "transporter" of hazardous waste under CERCLA. Kaiser Aluminum & Chemical Corporation v. Catellus Development Corporation, 976 F.2d 1338 (9th Cir. 1992).
- Ganton (Illinois - 1993): Cleanup contractors were held liable as "operators" and for "disposal" under CERCLA citing Kaiser. Ganton Technologies, Inc. v. Quadion Corporation, 834 F. Supp. 1018 (N.D. Ill. 1993).
- Tippins (Pennsylvania - 1994): Cleanup consultant on disposal site selection was held to have "active participation" in selection and therefore to be a "transporter" under CERCLA. Tippins Incorporated v. USX Corporation, 63 U.S.L.W. 2172 (3rd Cir. 1994).
- Redwing Carriers (Alabama - 1996): In a CERCLA contribution action, the Eleventh Circuit reversed a district court decision holding that no "arranger" liability had arisen during construction where the contractor did not intend to dispose of a hazardous substance. The Circuit Court followed Catellus and Tanglewood East Homeowners, stating that CERCLA's definition of "disposal" included the movement of contaminated soil during the excavating and grading of a construction site. The Court then reversed the order granting summary judgment for the construction company that distributed contaminated soil while excavating, grading and

filling the land in 1973-74. Redwing Carriers v. Saraland Apartments, Ltd., 875 F. Supp. 1545 (S.D. Ala. 1995), rev'd, 94 F.3d 1489 (11th Cir. 1996).

Other CERCLA Decisions Regarding Contractor Liability

- Hines Lumber (Arkansas - 1988): Design/build contractor of a wood treatment plant, who furnished chemicals and trained owner to operate it, was held not to be an "operator" under CERCLA since contractor did not control day-to-day operations of plant after it was built. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988), aff'd 861 F.2d 155 (7th Cir. 1988).
- Stewman (Arkansas - 1992): Two response action contractors (RACs as defined at § 119(e)(2)) were held subject to negligence standard, applying § 119(a), and to joint and several liability, under CERCLA. (At trial, jury found both RACs to be free from negligence.) Stewman v. Mid-South Wood Products of Mena, Inc., Civil No. 91-2047, U.S. District Court, W.D. Ark. (Order of June 12, 1992), aff'd 993 F.2d 646 (8th Cir. 1993).
- Brookfield-North Riverside (Illinois - 1992): Construction contractor that unknowingly installed a water main through soil contaminated by hazardous substances from underground storage tank was held not to be an "owner," "operator," or "arranger for transport" under CERCLA. Brookfield-North Riverside Water Comm. v. Martin Oil Marketing, Ltd., 1992 WL 63274 (N.D. Ill., Mar. 12, 1992).
- Berger (Florida - 1993): Independent engineering contractor that provided technical and engineering services in connection with design and operation of a landfill held not to be an "operator" under CERCLA because it neither actually controlled nor had authority to control landfill operations. City of North Miami v. Berger, 828 F. Supp. 401 (E.D. Va. 1993).
- CP Systems (Illinois - 1994): Plaintiff PRP was ordered by EPA to perform an emergency removal of wastes for which PRP's contractor had consulted on transportation and disposal. Contribution action against contractor was dismissed since contractor did not own or have control over the wastes, and PRP made ultimate decision as to disposal. CP Systems, Inc. v. Recovery Corporation of Illinois, 1994 WL 174162 (N.D. Ill., May 5, 1994).
- ACC Chemical (Iowa - 1995): Contractor hired to pump perc into pipe lines was not liable as a past owner or operator where it had no ownership interest in the facility and exercised no control over facility operations, was not liable as a generator or arranger when it never had any ownership or possessory interest in the substance it was pumping, and was not liable as a transporter where it never selected or actively participated in the selection of the means of disposal. ACC Chem. Co. v. Halliburton Co., Civil No. 3-92-70178 (S.D. Iowa 1995).
- New Castle County (Delaware - 1996): The U.S. District Court for Delaware held that New Castle County, which had entered into a consent decree to resolve litigation with the EPA regarding groundwater contamination at a county landfill, could sue the EPA's cleanup

contractor for negligence under CERCLA Section 119(a)(1) when the contractor's well construction allegedly created a conduit for further contamination. The court stated that Section 119(a)(1) provides that a RAC is liable to "any other person" who is harmed by that RAC's negligent or intentional conduct, and absent any language to the contrary, "any other person" is to be construed broadly and includes PRPs. New Castle County is also appealing another District Court ruling, and seeks to hold the RAC strictly liable under CERCLA § 107 (to the same extent as any other PRP), notwithstanding Section 119(a)(1), which protects RACs from CERCLA strict liability. New Castle County v. Halliburton NUS Corp., 903 F. Supp. 771 (D. Del. 1995), on appeal, Appeal No. 96-7443 (3d Cir. 1996).

- CDMG Realty (New Jersey - 1996): The Third Circuit vacated a district court's decision that soil testing was too insignificant to constitute "disposal" under CERCLA, and that only "significant disturbance of already contaminated soil constitutes disposal." The Circuit Court reversed the district court's ruling for the prior owner, stating that, "[s]oil testing that disperses contaminants . . . may constitute 'disposal.'" The Circuit Court also noted that "CERCLA contemplates that some soil investigation be allowed" and that the current owner must show not only that the soil investigation caused the spread of contaminants but "also that the investigation was conducted negligently." The court thus concluded that "only 'appropriate' soil investigations -- i.e., those that do not negligently spread contamination -- fall outside the definition of 'disposal.'" U.S. v. CDMG Realty Co., 875 F. Supp. 1077 (D.N.J. 1995), *rev'd in part*, 96 F.3d 706 (3d Cir. 1996).

State Strict Liability Decision Against Contractors

- Hagen (Iowa - 1995): Iowa's petroleum underground storage tank act's strict liability standard for PRPs was held to apply to a contractor consulting on the location of a monitoring well and the subcontractor drilling company whose well punctured an underground storage tank releasing petroleum contaminants. While there were other involved parties and defenses to negligence claims, the court held that these issues are "irrelevant" since their conduct was a proximate cause of the release and they are strictly liable for the recovery of cleanup costs. (The court also held that drilling is not an unusual activity around underground storage tanks and "not an abnormally dangerous activity, which separately would have triggered liability without-fault and vicarious liability.") Hagen v. Texaco Refining and Marketing, Inc., 526 N.W.2d 531 (Iowa 1995).

PRP Litigation Against Contractors

- Heldt (South Dakota - 1988): Defendant PRP counterclaimed against the Government's contractors alleging that the contractor intentionally exaggerated contamination at the Superfund cleanup site. U.S. v. Heldt, Civil No. 86-4102, U.S. District Court, South Dakota. (Pending).

- AMI (Ohio 1990) - Plaintiff had been owner then lessor of a manufacturing site which state ordered to be cleaned up of toxic wastes after plaintiff had sold its interests in the site. When current owners refused to cleanup the site, plaintiff hired a cleanup contractor. Plaintiff sued current owners under CERCLA for contribution and under state laws for quasi-contractual damages. Defendant owners counter-claimed against the cleanup contractor for damages to their property. AM International, Inc. v. International Forging Equipment, 743 F. Supp. 525 (M.D. Ohio), *aff'd in part*, 982 F.2d 989 (6th Cir. 1993).
- Oaas (Montana - 1990): Lead PRP at Superfund site initiated contribution action against two RACs working under contract to U.S. EPA, alleging strict liability as "operators" and alleging that negligence or gross negligence further spread contamination. Atlantic Richfield Co. v. Oaas, Civil No. CV-90-75-BU-PGH, U.S. District Court, Montana. (Pending).
- Brockman (Illinois - 1992): Defendant owners of a landfill in suit filed by the state, made third party contribution claim against state's contractor alleging contractor's negligent drilling of monitoring well spread leachate. Contractor held subject to liability under state contribution act. Illinois v. Brockman, 148 Ill. 2d 260, 592 N.E.2d 1026 (Ill. 1992).
- Amtreco (Georgia - 1992): PRP at EPA removal site alleged that EPA's contractor caused property damage and conspired with Government to increase cleanup costs. Contractor's effort to invoke government contractor and government agency defenses was denied. Amtreco Inc. v. OH Materials, Inc., 802 F. Supp. 443, M.D. Georgia (1992). (Continuing).
- Chatham Steel (Florida - 1994): Responsible party under a CERCLA consent decree sued the RAC and a remedial planning consultant for the site as "generators" and "transporters," and for negligence. alleging their actions spread contamination to uncontaminated areas of the site. Chatham Steel Corporation v. Sapp, 858 F. Supp. 1130 (N.D. Florida 1994). (Before ruling on summary judgment motions, the RAC and consultant were dismissed).
- Tri-State Mint (South Dakota 1994): Court dismissed responsible party's claim against state's laboratory contractor that contractor provided negligent analysis. Court held contractor owed no duty to the responsible party, only to state. Tri-State Mint, Inc. v. Riedel Environmental Services, Inc., 29 F.3d 424 (8th Cir. 1994).
- Atlas Properties (South Carolina - 1994): Court dismissed claim that EPA's Superfund contractor allegedly had spread contaminated soil to plaintiff's adjoining uncontaminated property. In its dismissal, court applied Government contractor defense concluding that the contractor merely executed EPA's instructions in cleaning up the site. Richland-Lexington Airport District v. Atlas Properties, 854 F. Supp. 400 (D.S.C. 1994).
- Bronstein (New Hampshire - 1995): New Hampshire Supreme Court ruled that an environmental consulting firm that surveyed property and incorrectly concluded that there was no hazardous waste contamination was not liable to eventual purchasers of the property where the firm was not hired by the purchasers and, because of limitations on dissemination and exclusivity provisions contained in their contract and in their survey reports, it was not

foreseeable that the erroneous information would ever reach the eventual buyers. Bronstein v. GZA Geoenvironmental, Inc., 665 A.2d 369 (N.H. 1995).

- Levy (Illinois - 1995): Owner's successful CERCLA action against former owners did not preclude subsequent suit against the former owner's environmental engineering firm for negligent misrepresentation. While the CERCLA suit established liability regarding the former owners, neither CERCLA nor the doctrine of collateral estoppel prevented plaintiffs from establishing that the contractor was also liable for the same response costs under a state common law cause of action. However, because CERCLA expressly prohibits double recovery, the contractor could only face liability for the uncompensated amount of response costs. Levy v. Versar, Inc., 882 F. Supp. 736 (N.D. Ill. 1995).

Third Party Claims Against Contractors

- Fernald (Ohio - 1985): Neighbors alleged that DOE's management and operations contractor at Fernald Materials Production Center caused emotional distress and diminished property values. In a 1989 ruling, court found Fernald operation was an "abnormally dangerous" activity for which strict liability was appropriate. Case was settled for a government payment exceeding \$80 million to a trust fund. Crawford v. National Lead Co., 784 F. Supp. 439 (S.D. Ohio 1989).

- Fernald (Ohio - 1990): Management and operations contractor's former employees at Fernald sued contractor alleging emotional distress and economic injury from excessive exposure to radioactive and other hazardous materials. Case being settled for a government payment of about \$20 million in medical monitoring and cash compensation. Day v. NLO, No. C-1-90-067, U.S. District Court, S.D. Ohio, settlement announced July 26, 1994.

- Dumes (Texas - 1990): Off-site neighbors sued state's contractor alleging inadequate closure plan allowed off-site migration of hazardous waste. Dumes v. Houston Lighting & Power Company, Civil No. C-90-330, U.S. District Court, S.D. Texas. (Contractor dismissed as result of settlement).

- Mound (Ohio - 1991): Parallels Crawford case (above). Neighbors of DOE's Mound facility allege that DOE's management and operations contractor caused them emotional distress and diminished property values. Suit also alleges that contractor is an "operator" and "arranger for disposal" under CERCLA. Stepp v. Monsanto Research Corp., Case No. C-3-91-468, U.S. District Court, S.D. Ohio (Pending).

- Kingsmill Community (Texas - 1992): Plaintiff neighbors sued private party's contractor alleging the contractor had a duty to warn them of hazards at the neighboring site. Kingsmill Community Water Supply Corp. v. Hoechst Corp., No. 92-11623 (Tex. Dist. Ct.) (Dismissed 1992).

- Timex (Connecticut - 1996): Neighbors of a contaminated industrial site sued the site owner and its environmental contractor, alleging that the contractor owed a duty of care to the neighbors in the investigation of the site's contamination, and that the duty was breached through an allegedly negligent investigation and by failing to disclose conditions found at the site to the neighbors. The U.S. District Court for Connecticut concluded that environmental consultants and engineers only have an affirmative duty to take action on behalf of third parties in extremely limited circumstances analogous to third party liability for lawyers and accountants. The court also upheld the contractor's motion to dismiss claims of negligence *per se*, and under the Connecticut Uniform Trade Practices Act. Dorthea v. Timex Corp., 1996 U.S. Dist. LEXIS 16260, *mot. denied, mot. granted*, (D. Conn. Sept. 30, 1996).
- Cullens (Georgia - 1994): Plaintiffs allege that seven Response Action Contractors and consultants, under contract to PRP at Superfund site, had duty to notify plaintiffs of the dangers of the cleanup site. Cullens v. Reichhold Chemicals, Inc., Case No. 94VS87151G, State Court of Fulton County, Georgia (1994). (RACs have been dismissed as a result of a partial settlement).
- Murlas (Illinois - 1994): Current property owner sued environmental consultant who had been hired by a former owner to survey, oversee and monitor the cleanup of a former service station. The consultant, operating under a confidentiality agreement, communicated that contamination was migrating toward groundwater. Current property owner did not learn of the problem and began building on the property. The court allowed the claims of negligence and breach of third party contract to go forward because the consultant failed to disclose its findings, notwithstanding the confidentiality clause. Murlas Living Trust v. Mobil Oil Corp., 1994 WL 130778 (N.D. Ill. Apr. 13, 1994). (Pending).
- Garrett (Texas - 1995): Class action citizens suit against oil companies/gasoline marketers and their environmental consultants, for property damage associated with alleged leaking underground storage tanks, claiming, among other things, that environmental consultants have an independent legal duty of care to plaintiffs to notify of off-site spread of contamination and have deliberately avoided concluding that contamination spread off-site. Garrett v. Star Enterprise, Case No. D152441, District Court, Jefferson County, Texas (Pending).
- Adair (Texas - 1995): Identical claims as in Garrett (above). Adair v. Chevron, Case No. B152440, District Court, Jefferson County, Texas. (Pending).
- Jacobson (Connecticut - 1996): A Connecticut Superior Court held that a property seller can assert a cause of action for negligent misrepresentation against an environmental contractor. The prospective buyer's environmental contractor prepared an allegedly erroneous report that led to a modification of the purchase agreement detrimental to the seller. The court held that the environmental contractor had a duty to accurately report its findings since the contractor was in the business of supplying information and knew others would rely upon the information. The seller was not required to demonstrate that it was a third party beneficiary of the underlying contract, only to show that the contractor knew or should have known of the seller's reliance and

that the reliance was reasonable under the circumstances. Jacobson v. Environmental Risk Ltd., 1996 Conn. Super. LEXIS 597 (Conn. Super. Ct. Mar. 1, 1996).

CERCLA "Discovery Rule" Pre-empts State Statute of Repose

◦ Angeles Chemical (California - 1996): Plaintiff, a bulk chemical repacking company, hired defendant, a general construction company, to construct modifications to its plant. The chemical company alleged that the constructor severed a pipe used to carry liquids, thereby contaminating the plant site with toxics. The court found that the action was timely under California's statute of limitations for contracts and negligence claims, but untimely for latent defects under the statute of repose. The California Court of Appeals held, however, that where a party has state law claims that a latent construction defect contaminated personal property with toxic materials, the "Federally required commencement date" mandated by CERCLA § 309 pre-empts the state law ten-year statute of repose, and the repose statute began to run no earlier than the date on which the plaintiff discovered, or should have discovered, the injury and its causes. Angeles Chemical Co. v. Spencer & Jones, 51 Cal. Rptr.2d 594 (Cal. Ct. App. 1996).

**ADVOCATES FOR
PROFESSIONAL JUDGMENT
IN GEOPROFESSIONAL PRACTICE**

Reply to:

Terre Bell
1015 15th Street, NW
Suite 802
Washington, D.C. 20005

August 25, 1997

Senator John H. Chafee
Chair
Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, DC 20510

Senator Robert C. Smith
Chair
Superfund, Waste Control and Risk Assessment Subcommittee
410 Dirksen Senate Office Building
Washington, DC 20510

Subject: Superfund Reauthorization Legislation

Dear Chairman Chafee and Chairman Smith:

The Hazardous Waste Action Coalition (HWAC) and other professional organizations are gravely concerned by the proliferation of "standards" relating to the detection and cleanup of hazardous waste. To the untrained eye, these "standards" seem to create certainty about hazardous waste detection and cleanup when the steps established in them are followed. The problems created by these standards and the misperceptions they create has led us to form a coalition called **Advocates for Professional Judgment in Geoprofessional Practice (APJGP)**. The goal of APJGP is to advocate for reliance on the "standard of care" and professional judgment provided by practitioners such as engineers, environmental consultants, and geologists (to name a few) and against the promulgation of prescriptive professional practice standards that do not allow for deviations based on the particular characteristics of a site or individual test results.

The American Society for Testing and Materials (ASTM) has developed or is in the process of developing more than 100 prescriptive professional practice standards. The ASTM Standard E1527-94, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" is incorporated by reference into Title I of S.8. The undersigned organizations respectfully request that any reference to ASTM

standards, particularly ASTM Standard E1527-94, be removed from the Senate Superfund legislation. We believe that professional judgment must be utilized throughout the cleanup process, including the process of redeveloping Brownfields sites. Establishing ASTM Standard E1527-94 as "the" standard for Brownfields cleanups effectively precludes innovation and stifles professional practices.

Another danger in codifying reliance on an ASTM "standard" is that it will convey the false sense that blind adherence to the "standard" ensures the discovery of all hazardous substances that may be present on-site. In fact, ASTM uses the word "standard" only to connote specific approval by an ASTM Committee. Furthermore, according to ASTM, following an ASTM "standard practice" does "not produce a test result." In other words, practitioners performing a site assessment on the same site following the ASTM "standard" may reach different conclusions. Such an approach will endanger not only the legal and financial well-being of the parties involved in the Brownfields redevelopment effort, but the public health and environment of the surrounding community as well.


While the undersigned organizations understand the desire for certainty in the area of property redevelopment, the site assessment technology that is currently available is too weak to deliver the desired level of certainty. Until that technology improves, standardized procedures from ASTM or any other organization will not improve the situation. Today, the best that can be done is to rely on the professional judgment of engineers, geologists, and other trained professionals, working in partnership with state regulators. This approach has already advanced the state of the practice. Misplaced reliance on misleading "standards" is not a solution.

We greatly appreciate your consideration of this request.

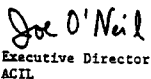
Sincerely,



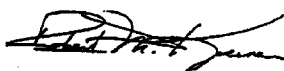
Louis R. Comunelli, P.E.
Chairperson
American Engineering Alliance



Howard R. Freeman
Executive Vice President
American Consulting Engineers Council



Joe O'Neil
Executive Director
ACIL



Peter Snaellie, Exec. Director
Geosynthetic Research
Institute



Ed Little
Executive Director
Association of
Drilled Shaft Contractors



Ellen Gath
AEG President

Association of Engineering
Geologists



Ronald E. Smith
Executive Vice President
ASPE: Professional Firms
Practicing in the
Geosciences



Manuel A. Fine, Executive Director
Deep Foundations Institute



Peter Snaellie, Exec. Director
Geo Council



Ronald E. Smith
Board of Governors
Geo-Institute of ASCE



Patrick F. O'Hara, Pres.
Hazardous Waste Action
Coalition

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. Its 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. The NAM's member companies and affiliated associations represent every industrial sector and employ more than 18 million people.

The NAM commends Chairman John Chafee (R-RI) and Chairman Bob Smith (R-NH) on their attempt to reauthorize one of our nation's centerpiece environmental statutes, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund"). The NAM is supportive of the Senators' continuing efforts to move Superfund reform legislation forward and remains hopeful that this process will result in an improved Superfund statute sooner rather than later. The NAM continues to have reservations, however, regarding several major titles and provisions of the draft chairman's mark of S. 8, The Superfund Cleanup Acceleration Act of 1997, which are summarized below.

REMEDIAL ACTIONS

The NAM applauds the Senators' efforts to improve Superfund's remedy provisions. The draft chairman's mark reflects progress on a number of key issues toward ensuring a site-specific, risk-based management approach to remediation. Areas that require further work include imposition of Federal and state standards, presumptive remedies and the preference for treatment.

In addition, the groundwater provisions are complex and require clarification. The provisions are extremely prescriptive and fail to provide the needed flexibility to adopt common sense solutions. The groundwater provisions deviate significantly from the site-specific, risk-based approach provided for soil contamination and, in several respects, would require more expensive, less cost-effective remedies than are currently being selected at some sites. Similarly, the remedy-update proposal introduces new and significant limitations not present in current practice and represents a step backwards.

LIABILITY

While the liability provisions did not change significantly, the NAM remains concerned that the reforms of Superfund's liability system should not, for reasons of equity, be limited to sites listed on the National Priorities List. Other liability provisions also remain inconsistent with the NAM's principles for reform. For example, in the division of liability for unattributable wastes between the fund and parties that remain liable for their own wastes, the potentially responsible parties (PRPs) should not be held liable for any wastes not of their own making.

In addition, since recycling is a positive behavior to be encouraged, the recycling provision should be designed to encourage recycling of all materials put to any productive secondary uses. Generator and transporter liability protection for recycling, whether required by law or undertaken voluntarily, should apply to all recycled material. This change would correctly provide incentives for recycling rather than narrowly providing an exemption for only specified materials.

NATURAL RESOURCE DAMAGES

The new draft natural resource damages (NRD) provisions properly exclude recovery of speculative non-use values, a change that the NAM strongly supports. However, the mark does not include a definition of "non-use values." Unfortunately, the provisions still allow trustees to assert claims for post-1980 lost-use damages. These claims are surplus since the aim of the NRD program is only to restore, replace or acquire the equivalent of the injured resource. In addition, the NAM's recommendations for reaffirming the liability cap and clarifying CERCLA's original intent to limit liability to damages related to post-1980 conduct were not addressed.

The draft also includes a number of new provisions to S. 8. Among the new items are: (a) use of mandatory mediation for NRD litigation; (b) confirmation of a PRP's right to contribution for NRD claims; and (c) elimination of the rebuttable presumption. The NAM generally supports these changes. The NAM's support for the elimination of the rebuttable presumption, however, is contingent on the addition of express legislative language affirming that PRPs will continue to be entitled to a trial de novo on all aspects of any claim for damages.

In addition, the NAM is concerned about the language in the mark that could result in the revival of stale NRD claims, as well as the language that could take away retroactive liability defenses that may well be afforded under current law.

Finally, a major issue raised by the chairman's mark is the growing number of inconsistencies between remedy-selection criteria elsewhere in the bill and the NRD restoration-selection criteria, such as use of the terms "cost-reasonable" and "technical impracticability" for remedy selection, and "cost-effective" and "technical feasibility" for restoration selection. These inconsistencies, and others, might lead to anomalous results such as NRD trustees requiring actions not permitted or required under the remedy-selection criteria. These two titles should be made consonant to reflect the reforms in the remedial actions title.

While the NAM supports certain of the mark's proposed changes to the NRD program, on balance the NAM is not persuaded that the draft NRD title will enhance the overall goal of Superfund reform.

STATE ROLE

The NAM is concerned that the mark allows states to use their own cleanup programs in lieu of any or all of the requirements of a revised CERCLA. This approach does not ensure that the federally legislated reforms will be carried through to the states where Superfund dollars are used.

CONCLUSION

These issues merit serious attention and we stand ready to work with appropriate parties to reach constructive solutions. The NAM continues to support other titles of the bill, including the brownfields provisions. The NAM applauds the continued effort to pass comprehensive reform of the badly broken Superfund program and desires to work toward a bill that will speed cleanups, reduce unnecessary costs and increase equity.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Superfund Cleanup Acceleration Act of 1997”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

TITLE I—BROWNFIELDS REVITALIZATION

- Sec. 101. Brownfields.
- Sec. 102. Assistance for qualifying State voluntary response programs.
- Sec. 103. Enforcement in cases of a release subject to a State plan.
- Sec. 104. Contiguous properties.
- Sec. 105. Prospective purchasers and windfall liens.
- Sec. 106. Safe harbor innocent landholders.

TITLE II—STATE ROLE

- Sec. 201. Transfer to the States of responsibility at non-Federal National Priorities List facilities.

TITLE III—LOCAL COMMUNITY PARTICIPATION

- Sec. 301. Definitions.
- Sec. 302. Public participation generally.
- Sec. 303. Improvement of public participation in the superfund decisionmaking process; local community advisory groups; technical assistance grants.

TITLE IV—SELECTION OF REMEDIAL ACTIONS

- Sec. 401. Definitions.
- Sec. 402. Selection and implementation of remedial actions.
- Sec. 403. Remedy selection methodology.
- Sec. 404. Remedy selection procedures.
- Sec. 405. Completion of physical construction and delisting.
- Sec. 406. Transition rules for facilities currently involved in remedy selection.
- Sec. 407. National Priorities List.

TITLE V—LIABILITY

- Sec. 501. Liability exceptions and limitations.
- Sec. 502. Contribution from the fund.
- Sec. 503. Expedited settlement for certain parties.
- Sec. 504. Allocation of liability for certain facilities.
- Sec. 505. Liability of response action contractors.
- Sec. 506. Release of evidence.
- Sec. 507. Contribution protection.
- Sec. 508. Treatment of religious, charitable, scientific, and educational organizations as owners or operators.
- Sec. 509. Common carriers.
- Sec. 510. Limitation on liability of railroad owners.
- Sec. 511. Liability of recyclers.

TITLE VI—FEDERAL FACILITIES

- Sec. 601. Transfer of authorities.
- Sec. 602. Limitation on criminal liability of Federal officers, employees, and agents.
- Sec. 603. Innovative technologies for remedial action at Federal facilities.

TITLE VII—NATURAL RESOURCE DAMAGES

- Sec. 701. Restoration of natural resources.
- Sec. 702. Assessment of injury to and restoration of natural resources.
- Sec. 703. Consistency between response actions and resource restoration standards.
- Sec. 704. Contribution.
- Sec. 705. Period in which action for damages may be brought.
- Sec. 706. Mediation.
- Sec. 707. Effective date and transition rule.

TITLE VIII—MISCELLANEOUS

- Sec. 801. Result-oriented cleanups.
- Sec. 802. National Priorities List.
- Sec. 803. Obligations from the fund for response actions.
- Sec. 804. Technical corrections.

TITLE IX—FUNDING

Subtitle A—General Provisions

- Sec. 901. Authorization of appropriations from the fund.
- Sec. 902. Orphan share funding.
- Sec. 903. Department of health and human services.
- Sec. 904. Limitations on research, development, and demonstration programs.
- Sec. 905. Authorization of appropriations from general revenues.
- Sec. 906. Additional limitations.
- Sec. 907. Reimbursement of potentially responsible parties.

TITLE I—BROWNFIELDS REVITALIZATION

SEC. 101. BROWNFIELDS.

(a) IN GENERAL.—Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) is amended by adding at the end the following:

“SEC. 127. BROWNFIELDS.

“(a) DEFINITIONS.—In this section:

1 “(1) ADMINISTRATIVE COST.—The term ‘ad-
2 ministrative cost’ does not include the cost of—

3 “(A) investigation and identification of the
4 extent of contamination;

5 “(B) design and performance of a response
6 action; or

7 “(C) monitoring of natural resources.

8 “(2) BROWNFIELD FACILITY.—The term
9 ‘brownfield facility’ means—

10 “(A) a parcel of land that contains an
11 abandoned, idled, or underused commercial or
12 industrial facility, the expansion or redevelop-
13 ment of which is complicated by the presence or
14 potential presence of a hazardous substance;
15 but

16 “(B) does not include—

17 “(i) a facility that is the subject of a
18 removal or planned removal under title I;

19 “(ii) a facility that is listed or has
20 been proposed for listing on the National
21 Priorities List or that has been delisted
22 under section 130(d)(6);

23 “(iii) a facility that is subject to cor-
24 rective action under section 3004(u) or
25 3008(h) of the Solid Waste Disposal Act

1 (42 U.S.C. 6924(u) or 6928(h)) at the
2 time at which an application for a grant
3 concerning the facility is submitted under
4 this section;
5 “(iv) a land disposal unit with respect
6 to which—
7 “(I) a closure notification under
8 subtitle C of the Solid Waste Disposal
9 Act (42 U.S.C. 6921 et seq.) has been
10 submitted; and
11 “(II) closure requirements have
12 been specified in a closure plan or
13 permit;
14 “(v) a facility with respect to which
15 an administrative order on consent or judi-
16 cial consent decree requiring cleanup has
17 been entered into by the United States
18 under this Act, the Solid Waste Disposal
19 Act (42 U.S.C. 6901 et seq.), the Federal
20 Water Pollution Control Act (33 U.S.C.
21 1251 et seq.), the Toxic Substances Con-
22 trol Act (15 U.S.C. 2601 et seq.), or the
23 Safe Drinking Water Act (42 U.S.C. 300f
24 et seq.);

1 “(vi) a facility that is owned or oper-
2 ated by a department, agency, or instru-
3 mentality of the United States; or

4 “(vii) a portion of a facility, for which
5 portion, assistance for response activity
6 has been obtained under subtitle I of the
7 Solid Waste Disposal Act (42 U.S.C. 6991
8 et seq.) from the Leaking Underground
9 Storage Tank Trust Fund established
10 under section 9508 of the Internal Reve-
11 nue Code of 1986.

12 “(3) ELIGIBLE ENTITY.—The term ‘eligible en-
13 tity’ means—

14 “(A) a general purpose unit of local gov-
15 ernment;

16 “(B) a land clearance authority or other
17 quasi-governmental entity that operates under
18 the supervision and control of or as an agent of
19 a general purpose unit of local government;

20 “(C) a regional council or group of general
21 purpose units of local government;

22 “(D) a redevelopment agency that is char-
23 tered or otherwise sanctioned by a State; and

24 “(E) an Indian tribe.

1 “(b) BROWNFIELD CHARACTERIZATION GRANT PRO-
2 GRAM.—

3 “(1) ESTABLISHMENT OF PROGRAM.—The Ad-
4 ministrator shall establish a program to provide
5 grants for the site characterization and assessment
6 of brownfield facilities.

7 “(2) ASSISTANCE FOR SITE CHARACTERIZATION
8 AND ASSESSMENT.—

9 “(A) IN GENERAL.—On approval of an ap-
10 plication made by an eligible entity, the Admin-
11 istrator may make grants out of the Fund to
12 the eligible entity to be used for the site charac-
13 terization and assessment of 1 or more
14 brownfield facilities or to capitalize a revolving
15 loan fund.

16 “(B) APPROPRIATE INQUIRY.—A site char-
17 acterization and assessment carried out with
18 the use of a grant under subparagraph (A)
19 shall be performed in accordance with section
20 101(35)(B).

21 “(3) MAXIMUM GRANT AMOUNT.—A grant
22 under subparagraph (A) shall not exceed, with re-
23 spect to any individual brownfield facility covered by
24 the grant, \$100,000 for any fiscal year or \$200,000
25 in total.

1 “(c) BROWNFIELD REMEDIATION GRANT PRO-
2 GRAM.—

3 “(1) ESTABLISHMENT OF PROGRAM.—The Ad-
4 ministrator shall establish a program to provide
5 grants to be used for capitalization of revolving loan
6 funds for response actions (excluding site character-
7 ization and assessment) at brownfield facilities.

8 “(2) ASSISTANCE FOR SITE CHARACTERIZATION
9 AND ASSESSMENT.—

10 “(A) IN GENERAL.—On approval of an ap-
11 plication made by a State or an eligible entity,
12 the Administrator may make grants out of the
13 Fund to the State or eligible entity to capitalize
14 a revolving loan fund to be used for response
15 actions (excluding site characterization and as-
16 sessment) at 1 or more brownfield facilities.

17 “(B) APPROPRIATE INQUIRY.—A site char-
18 acterization and assessment carried out with
19 the use of a grant under subparagraph (A)
20 shall be performed in accordance with section
21 101(35)(B).

22 “(3) MAXIMUM GRANT AMOUNT.—A grant
23 under subparagraph (A) shall not exceed, with re-
24 spect to any individual brownfield facility covered by

1 the grant, \$150,000 for any fiscal year or \$300,000
2 in total.

3 “(d) GENERAL PROVISIONS.—

4 “(1) SUNSET.—No amount shall be available
5 from the Fund for purposes of this section after the
6 fifth fiscal year after the date of enactment of this
7 section.

8 “(2) PROHIBITION.—No part of a grant under
9 this section may be used for payment of penalties,
10 fines, or administrative costs.

11 “(3) AUDITS.—The Inspector General of the
12 Environmental Protection Agency shall audit an ap-
13 propriate number of grants made under subsections
14 (b)(2) and (c)(2) to ensure that funds are used for
15 the purposes described in this section.

16 “(4) AGREEMENTS.—Each grant made under
17 this section shall be subject to an agreement that—

18 “(A) requires the eligible entity to comply
19 with all applicable State laws (including regula-
20 tions);

21 “(B) requires that the eligible entity shall
22 use the grant exclusively for purposes specified
23 in subsection (b)(2) or (c)(2);

24 “(C) in the case of an application by a
25 State under subsection (c)(2), payment by the

1 State of a matching share of at least 50 percent
2 of the costs of the response action for which the
3 grant is made, from other sources of State
4 funding; and

5 “(D) contains such other terms and condi-
6 tions as the Administrator determines to be
7 necessary to carry out the purposes of this sec-
8 tion.

9 “(5) LEVERAGING.—An eligible entity that re-
10 ceives a grant under paragraph (1) may use the
11 funds for part of a project at a brownfield facility
12 for which funding is received from other sources, but
13 the grant shall be used only for the purposes de-
14 scribed in subsection (b)(2) or (c)(2).

15 “(e) GRANT APPLICATIONS.—

16 “(1) IN GENERAL.—Any eligible entity may
17 submit an application to the Administrator, through
18 a regional office of the Environmental Protection
19 Agency and in such form as the Administrator may
20 require, for a grant under this section for 1 or more
21 brownfield facilities.

22 “(2) APPLICATION REQUIREMENTS.—An appli-
23 cation for a grant under this section shall include—

24 “(A) an identification of each brownfield
25 facility for which the grant is sought and a de-

1 description of the redevelopment plan for the area
2 or areas in which the brownfield facilities are
3 located, including a description of the nature
4 and extent of any known or suspected environ-
5 mental contamination within the area;

6 “(B) an analysis that demonstrates the po-
7 tential of the grant to stimulate economic devel-
8 opment on completion of the planned response
9 action, including a projection of the number of
10 jobs expected to be created at each facility after
11 remediation and redevelopment and, to the ex-
12 tent feasible, a description of the type and skill
13 level of the jobs and a projection of the in-
14 creases in revenues accruing to Federal, State,
15 and local governments from the jobs; and

16 “(C) information relevant to the ranking
17 criteria stated in paragraph (4).

18 “(3) APPROVAL.—

19 “(A) INITIAL GRANT.—On or about March
20 30 and September 30 of the first fiscal year fol-
21 lowing the date of enactment of this section, the
22 Administrator shall make grants under this sec-
23 tion to eligible entities that submit applications
24 before those dates that the Administrator deter-

1 mines have the highest rankings under ranking
2 criteria established under paragraph (4).

3 “(B) SUBSEQUENT GRANTS.—Beginning
4 with the second fiscal year following the date of
5 enactment of this section, the Administrator
6 shall make an annual evaluation of each appli-
7 cation received during the prior fiscal year and
8 make grants under this section to eligible enti-
9 ties that submit applications during the prior
10 year that the Administrator determines have
11 the highest rankings under the ranking criteria
12 established under paragraph (4).

13 “(4) RANKING CRITERIA.—The Administrator
14 shall establish a system for ranking grant applica-
15 tions that includes the following criteria:

16 “(A) The extent to which a grant will stim-
17 ulate the availability of other funds for environ-
18 mental remediation and subsequent redevelop-
19 ment of the area in which the brownfield facili-
20 ties are located.

21 “(B) The potential of the development plan
22 for the area in which the brownfield facilities
23 are located to stimulate economic development
24 of the area on completion of the cleanup, such
25 as the following:

1 “(i) The relative increase in the esti-
2 mated fair market value of the area as a
3 result of any necessary response action.

4 “(ii) The potential of a grant to cre-
5 ate new or expand existing business and
6 employment opportunities (particularly
7 full-time employment opportunities) on
8 completion of any necessary response ac-
9 tion.

10 “(iii) The estimated additional tax
11 revenues expected to be generated by eco-
12 nomic redevelopment in the area in which
13 a brownfield facility is located.

14 “(iv) The estimated extent to which a
15 grant would facilitate the identification of
16 or facilitate a reduction of health and envi-
17 ronmental risks.

18 “(v) The financial involvement of the
19 State and local government in any re-
20 sponse action planned for a brownfield fa-
21 cility and the extent to which the response
22 action and the proposed redevelopment is
23 consistent with any applicable State or
24 local community economic development
25 plan.

1 “(vi) The extent to which the site
2 characterization and assessment or re-
3 sponse action and subsequent development
4 of a brownfield facility involves the active
5 participation and support of the local com-
6 munity.

7 “(vii) Such other factors as the Ad-
8 ministrators considers appropriate to carry
9 out the purposes of this section.”.

10 (b) FUNDING.—Section 111 of the Comprehensive
11 Environmental Response, Compensation, and Liability Act
12 of 1980 (42 U.S.C. 9611) is amended by adding at the
13 end the following:

14 “(q) BROWNFIELD CHARACTERIZATION GRANT PRO-
15 GRAM.—For each of fiscal years 1998 through 2002, not
16 more than \$15,000,000 of the amounts available in the
17 Fund may be used to carry out section 127(b).

18 “(r) BROWNFIELD REMEDIATION GRANT PRO-
19 GRAM.—For each of fiscal years 1998 through 2002, not
20 more than \$25,000,000 of the amounts available in the
21 Fund may be used to carry out section 127(c).”.

22 **SEC. 102. ASSISTANCE FOR QUALIFYING STATE VOL-**
23 **UNTARY RESPONSE PROGRAMS.**

24 (a) DEFINITION.—Section 101 of the Comprehensive
25 Environmental Response, Compensation, and Liability Act

1 of 1980 (42 U.S.C. 9601) is amended by adding at the
2 end the following:

3 “(39) QUALIFYING STATE VOLUNTARY RESPONSE
4 PROGRAM.—The term ‘qualifying State voluntary re-
5 sponse program’ means a State program that in-
6 cludes the elements described in section 128(b).”.

7 (b) QUALIFYING STATE VOLUNTARY RESPONSE PRO-
8 GRAMS.—Title I of the Comprehensive Environmental Re-
9 sponse, Compensation, and Liability Act of 1980 (42
10 U.S.C. 9601 et seq.) (as amended by section 101(a)) is
11 amended by adding at the end the following:

12 **“SEC. 128. QUALIFYING STATE VOLUNTARY RESPONSE PRO-**
13 **GRAMS.**

14 “(a) ASSISTANCE TO STATES.—The Administrator
15 shall provide technical and other assistance to States to
16 establish and expand qualifying State voluntary response
17 programs that include the elements listed in
18 subsection (b).

19 “(b) ELEMENTS.—The elements of a qualifying State
20 voluntary response program are the following:

21 “(1) Opportunities for technical assistance for
22 voluntary response actions.

23 “(2) Adequate opportunities for public partici-
24 pation, including prior notice and opportunity for

1 comment in appropriate circumstances, in selecting
2 response actions.

3 “(3) Streamlined procedures to ensure expedi-
4 tious voluntary response actions.

5 “(4) Oversight and enforcement authorities or
6 other mechanisms that are adequate to ensure
7 that—

8 “(A) voluntary response actions will pro-
9 tect human health and the environment and be
10 conducted in accordance with applicable Federal
11 and State law; and

12 “(B) if the person conducting the vol-
13 untary response action fails to complete the
14 necessary response activities, including oper-
15 ation and maintenance or long-term monitoring
16 activities, the necessary response activities are
17 completed.

18 “(5) Mechanisms for approval of a voluntary re-
19 sponse action plan.

20 “(6) A requirement for certification or similar
21 documentation from the State to the person conduct-
22 ing the voluntary response action indicating that the
23 response is complete.

24 “(c) COMPLIANCE WITH ACT.—A person that con-
25 ducts a voluntary response action under this section at a

1 facility that is listed or proposed for listing on the Na-
2 tional Priorities List shall implement applicable provisions
3 of this Act or of similar provisions of State law in a man-
4 ner comporting with State policy, so long as the remedial
5 action that is selected protects human health and the envi-
6 ronment to the same extent as would a remedial action
7 selected by the Administrator under section 121(a).”.

8 (e) FUNDING.—Section 111 of the Comprehensive
9 Environmental Response, Compensation, and Liability Act
10 of 1980 (42 U.S.C. 9611) (as amended by section 101(b))
11 is amended by adding at the end the following:

12 “(s) QUALIFYING STATE VOLUNTARY RESPONSE
13 PROGRAM.—For each of fiscal years 1998 through 2002,
14 not more than \$25,000,000 of the amounts available in
15 the Fund may be used for assistance to States to main-
16 tain, establish, and administer qualifying State voluntary
17 response programs, during the first 5 full fiscal years fol-
18 lowing the date of enactment of this subparagraph, dis-
19 tributed among each of the States that notifies the Admin-
20 istrator of the State’s intent to establish a qualifying State
21 voluntary response program and each of the States with
22 a qualifying State voluntary response program. For each
23 fiscal year there shall be available to each qualifying state
24 voluntary response program a grant in the amount of at
25 least \$250,000.”.

1 **SEC. 103. ENFORCEMENT IN CASES OF A RELEASE SUBJECT**
2 **TO A STATE PLAN.**

3 Title I of the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of 1980 (42
5 U.S.C. 9601 et seq.) (as amended by section 102(b)) is
6 amended by adding at the end the following:

7 **"SEC. 129. ENFORCEMENT IN CASES OF A RELEASE SUB-**
8 **JECT TO A STATE PLAN.**

9 "(a) EPA NOTIFICATION.—

10 "(1) IN GENERAL.—In the case of a facility at
11 which there is a release or threatened release of a
12 hazardous substance, pollutant, or contaminant and
13 for which the Administrator intends to undertake an
14 administrative or enforcement action, the Adminis-
15 trator, prior to taking the administrative or enforce-
16 ment action, shall notify the State of the action the
17 Administrator intends to take and wait for an ac-
18 knowledgement from the State pursuant to para-
19 graph (2).

20 "(2) STATE RESPONSE.—Not later than 48
21 hours after receiving a notice from the Adminis-
22 trator under paragraph (1), the State shall notify
23 the Administrator if the facility is currently or has
24 been subject to a State remedial action plan.

25 "(b) ENFORCEMENT.—

“(1) IN GENERAL.—In the case of a facility at which there is a release or threatened release of a hazardous substance subject to a State remedial action plan, neither the President nor any other person may use any authority under this Act to take an administrative or judicial enforcement action or to bring a private civil action against any person regarding any matter that is within the scope of the plan, except as provided in paragraph (2).

“(A) the State requests that the President provide assistance in the performance of a response action and that the enforcement bar in paragraph (1) be lifted;

“(i) makes a written determination that the State is unwilling or unable to take appropriate action, after the Administrator has provided the Governor or other chief executive of the State notice and an opportunity to cure; and

1 health advisory, or the Administrator de-
2 termines that there is an imminent threat
3 of actual exposure of a hazardous sub-
4 stance to humans or the environment;

5 “(C) the Administrator determines that
6 contamination has migrated across a State line,
7 resulting in the need for further response action
8 to protect human health or the environment; or

9 “(D) the Administrator obtains a declara-
10 tory judgment in United States district court
11 that there is a substantial risk presented that
12 requires further remediation to protect human
13 health or the environment, as revealed by—

14 “(i) newly discovered information re-
15 garding contamination at the facility;

16 “(ii) the discovery that fraud was
17 committed in demonstrating attainment of
18 standards at the facility; or

19 “(iii) a failure of the remedy under
20 the State remedial action plan or a change
21 in land use giving rise to a clear threat of
22 exposure.

23 “(c) RELEASES NOT SUBJECT TO STATE PLANS.—

24 In the case of a facility at which there is a release or
25 threatened release of a hazardous substance that is not

1 subject to a State remedial action plan, the President shall
2 provide notice to the State not later than 48 hours after
3 issuing an order under section 106(a) addressing the re-
4 lease or threatened release. The order shall cease to have
5 force or effect on the date that is 90 days after issuance
6 unless the State concurs in the continuation of the order.
7 “(d) COST OR DAMAGE RECOVERY ACTIONS.—Sub-
8 section (b) shall not apply to an action brought by a State
9 or Indian tribe for the recovery of costs or damages under
10 section 107.”.

11 **SEC. 104. CONTIGUOUS PROPERTIES.**

12 (a) IN GENERAL.—Section 107 of the Comprehensive
13 Environmental Response, Compensation, and Liability Act
14 of 1980 (42 U.S.C. 9607(a)) is amended by adding at the
15 end the following:

16 “(o) CONTIGUOUS PROPERTIES.—

17 “(1) NOT CONSIDERED TO BE AN OWNER OR
18 OPERATOR.—A person that owns or operates real
19 property that is contiguous to or otherwise similarly
20 situated with respect to real property on which there
21 has been a release or threatened release of a hazard-
22 ous substance and that is or may be contaminated
23 by the release shall not be considered to be an owner
24 or operator of a vessel or facility under subpara-

1 graph (C) or (D) of subsection (a) (1) solely by rea-
2 son of the contamination if—

3 “(A) the person did not cause, contribute,
4 or consent to the release or threatened release;
5 and

6 “(B) the person is not liable, and is not af-
7 filiated with any other person that is liable, for
8 any response costs at the facility, through any
9 direct or indirect familial relationship, or any
10 contractual, corporate, or financial relationship
11 other than that created by the instruments by
12 which title to the facility is conveyed or fi-
13 nanced.

14 “(2) COOPERATION, ASSISTANCE, AND AC-
15 CESS.—Notwithstanding paragraph (1), a person de-
16 scribed in paragraph (1) shall provide full coopera-
17 tion, assistance, and facility access to the persons
18 that are responsible for response actions at the facil-
19 ity, including the cooperation and access necessary
20 for the installation, integrity, operation, and mainte-
21 nance of any complete or partial response action at
22 the facility.

23 “(3) ASSURANCES.—The Administrator may—

24 “(A) issue an assurance that no enforce-
25 ment action under this Act will be initiated

1 against a person described in paragraph (1);
2 and

3 “(B) grant a person described in para-
4 graph (1) protection against a cost recovery or
5 contribution action under section 113(f).”.

6 (b) CONFORMING AMENDMENT.—Section 107(a) of
7 the Comprehensive Environmental Response, Compensa-
8 tion, and Liability Act of 1980 (42 U.S.C. 9607) is
9 amended by striking “of this section” and inserting “and
10 the exemptions and limitations stated in this section”.

11 **SEC. 105. PROSPECTIVE PURCHASERS AND WINDFALL**
12 **LIENS.**

13 (a) DEFINITION.—Section 101 of the Comprehensive
14 Environmental Response, Compensation, and Liability Act
15 of 1980 (42 U.S.C. 9601) (as amended by section 102(a))
16 is amended by adding at the end the following:

17 “(40) BONA FIDE PROSPECTIVE PURCHASER.—

18 The term ‘bona fide prospective purchaser’ means a
19 person that acquires ownership of a facility after the
20 date of enactment of this paragraph, or a tenant of
21 such a person, that establishes each of the following
22 by a preponderance of the evidence:

23 “(A) DISPOSAL PRIOR TO ACQUISITION.—

24 All active disposal of hazardous substances at

1 the facility occurred before the person acquired
2 the facility.

3 “(B) INQUIRIES.—

4 “(i) IN GENERAL.—The person made
5 all appropriate inquiries into the previous
6 ownership and uses of the facility and the
7 facility’s real property in accordance with
8 generally accepted good commercial and
9 customary standards and practices.

10 “(ii) STANDARDS AND PRACTICES.—
11 The standards and practices referred to in
12 paragraph (35)(B)(ii) or those issued or
13 adopted by the Administrator under that
14 paragraph shall be considered to satisfy
15 the requirements of this subparagraph.

16 “(iii) RESIDENTIAL USE.—In the case
17 of property for residential or other similar
18 use purchased by a nongovernmental or
19 noncommercial entity, a facility inspection
20 and title search that reveal no basis for
21 further investigation shall be considered to
22 satisfy the requirements of this subpara-
23 graph.

24 “(C) NOTICES.—The person provided all
25 legally required notices with respect to the dis-

1 covery or release of any hazardous substances
2 at the facility.

3 “(D) CARE.—The person exercised appro-
4 priate care with respect to each hazardous sub-
5 stance found at the facility by taking reasonable
6 steps to stop any continuing release, prevent
7 any threatened future release and prevent or
8 limit human or natural resource exposure to
9 any previously released hazardous substance.

10 “(E) COOPERATION, ASSISTANCE, AND AC-
11 CESS.—The person provides full cooperation,
12 assistance, and facility access to the persons
13 that are responsible for response actions at the
14 facility, including the cooperation and access
15 necessary for the installation, integrity, oper-
16 ation, and maintenance of any complete or par-
17 tial response action at the facility.

18 “(F) RELATIONSHIP.—The person is not
19 liable, and is not affiliated with any other per-
20 son that is liable, for any response costs at the
21 facility, through any direct or indirect familial
22 relationship, or any contractual, corporate, or
23 financial relationship other than that created by
24 the instruments by which title to the facility is
25 conveyed or financed.”.

1 (b) AMENDMENT.—Section 107 of the Comprehen-
2 sive Environmental Response, Compensation, and Liabil-
3 ity Act of 1980 (42 U.S.C. 9607) (as amended by section
4 104) is amended by adding at the end the following:

5 “(p) PROSPECTIVE PURCHASER AND WINDFALL
6 LIEN.—

7 “(1) LIMITATION ON LIABILITY.—Notwith-
8 standing subsection (a), a bona fide prospective pur-
9 chaser whose potential liability for a release or
10 threatened release is based solely on the purchaser’s
11 being considered to be an owner or operator of a fa-
12 cility shall not be liable as long as the bona fide pro-
13 spective purchaser does not impede the performance
14 of a response action or natural resource restoration.

15 “(2) LIEN.—If there are unrecovered response
16 costs at a facility for which an owner of the facility
17 is not liable by reason of section 107(n)(1) and each
18 of the conditions described in paragraph (3) is met,
19 the United States shall have a lien on the facility,
20 or may obtain from appropriate responsible party a
21 lien on any other property or other assurances of
22 payment satisfactory to the Administrator, for such
23 unrecovered costs.

24 “(3) CONDITIONS.—The conditions referred to
25 in paragraph (1) are the following:

1 “(A) RESPONSE ACTION.—A response ac-
2 tion for which there are unrecovered costs is
3 carried out at the facility.

4 “(B) FAIR MARKET VALUE.—The response
5 action increases the fair market value of the fa-
6 cility above the fair market value of the facility
7 that existed 180 days before the response action
8 was initiated.

9 “(C) SALE.—A sale or other disposition of
10 all or a portion of the facility has occurred.

11 “(4) AMOUNT.—A lien under paragraph (2)—

12 “(A) shall not exceed the increase in fair
13 market value of the property attributable to the
14 response action at the time of a subsequent sale
15 or other disposition of the property;

16 “(B) shall arise at the time at which costs
17 are first incurred by the United States with re-
18 spect to a response action at the facility;

19 “(C) shall be subject to the requirements
20 of subsection (1)(3); and

21 “(D) shall continue until the earlier of sat-
22 isfaction of the lien or recovery of all response
23 costs incurred at the facility.”.

1 **SEC. 106. SAFE HARBOR INNOCENT LANDHOLDERS.**

2 (a) **AMENDMENT.**—Section 101(35) of the Com-
3 prehensive Environmental Response, Compensation, and
4 Liability Act of 1980 (42 U.S.C. 9601(35)) is amended
5 by striking subparagraph (B) and inserting the following:

6 “(B) **KNOWLEDGE OF INQUIRY REQUIRE-**
7 **MENT.**—

8 “(i) **ALL APPROPRIATE INQUIRIES.**—
9 To establish that the defendant had no
10 reason to know of the matter described in
11 subparagraph (A)(i), the defendant must
12 show that, at or prior to the date on which
13 the defendant acquired the facility, the de-
14 fendant undertook all appropriate inquiries
15 into the previous ownership and uses of the
16 facility in accordance with generally ac-
17 cepted good commercial and customary
18 standards and practices.

19 “(ii) **STANDARDS AND PRACTICES.**—
20 The Administrator shall by regulation es-
21 tablish as standards and practices for the
22 purpose of clause (i)—

23 “(I) the American Society for
24 Testing and Materials (ASTM) Stand-
25 ard E1527–94, entitled ‘Standard
26 Practice for Environmental Site As-

1 sessments: Phase I Environmental
2 Site Assessment Process'; or

3 “(II) alternative standards and
4 practices under clause (iii).

5 “(iii) ALTERNATIVE STANDARDS AND
6 PRACTICES.—

7 “(I) IN GENERAL.—The Admin-
8 istrator may by regulation issue alter-
9 native standards and practices or des-
10 ignate standards developed by other
11 organizations than the American Soci-
12 ety for Testing and Materials after
13 conducting a study of commercial and
14 industrial practices concerning the
15 transfer of real property in the United
16 States.

17 “(II) CONSIDERATIONS.—In issu-
18 ing or designating alternative stand-
19 ards and practices under subclause
20 (I), the Administrator shall consider
21 including each of the following:

22 “(aa) The results of an in-
23 quiry by an environmental pro-
24 fessional.

1 “(bb) Interviews with past
2 and present owners, operators,
3 and occupants of the facility and
4 the facility’s real property for the
5 purpose of gathering information
6 regarding the potential for con-
7 tamination at the facility and the
8 facility’s real property.

9 “(cc) Reviews of historical
10 sources, such as chain of title
11 documents, aerial photographs,
12 building department records, and
13 land use records to determine
14 previous uses and occupancies of
15 the real property since the prop-
16 erty was first developed.

17 “(dd) Searches for recorded
18 environmental cleanup liens, filed
19 under Federal, State, or local
20 law, against the facility or the fa-
21 cility’s real property.

22 “(ee) Reviews of Federal,
23 State, and local government
24 records (such as waste disposal
25 records), underground storage

1 tank records, and hazardous
2 waste handling, generation, treat-
3 ment, disposal, and spill records,
4 concerning contamination at or
5 near the facility or the facility's
6 real property.

7 “(ff) Visual inspections of
8 the facility and facility's real
9 property and of adjoining prop-
10 erties.

11 “(gg) Specialized knowledge
12 or experience on the part of the
13 defendant.

14 “(hh) The relationship of
15 the purchase price to the value of
16 the property if the property was
17 uncontaminated.

18 “(ii) Commonly known or
19 reasonably ascertainable informa-
20 tion about the property.

21 “(jj) The degree of obvious-
22 ness of the presence or likely
23 presence of contamination at the
24 property, and the ability to detect

1 such contamination by appro-
2 priate investigation.

3 “(iv) SITE INSPECTION AND TITLE
4 SEARCH.—In the case of property for resi-
5 dential use or other similar use purchased
6 by a nongovernmental or noncommercial
7 entity, a facility inspection and title search
8 that reveal no basis for further investiga-
9 tion shall be considered to satisfy the re-
10 quirements of this subparagraph.”.

11 (b) STANDARDS AND PRACTICES.—

12 (1) ESTABLISHMENT BY REGULATION.—The
13 Administrator of the Environmental Protection
14 Agency shall issue the regulation required by section
15 101(35)(B)(ii) of the Comprehensive Environmental
16 Response, Compensation, and Liability Act of 1980
17 (as added by subsection (a)) not later than 1 year
18 after the date of enactment of this Act.

19 (2) INTERIM STANDARDS AND PRACTICES.—
20 Until the Administrator issues the regulation de-
21 scribed in paragraph (1), in making a determination
22 under section 101(35)(B)(i) of the Comprehensive
23 Environmental Response, Compensation, and Liabil-
24 ity Act of 1980 (as added by subsection (a)), there
25 shall be taken into account—

1 (A) any specialized knowledge or experi-
2 ence on the part of the defendant;

3 (B) the relationship of the purchase price
4 to the value of the property if the property was
5 uncontaminated;

6 (C) commonly known or reasonably ascer-
7 tainable information about the property;

8 (D) the degree of obviousness of the pres-
9 ence or likely presence of contamination at the
10 property; and

11 (E) the ability to detect the contamination
12 by appropriate investigation.

13 **TITLE II—STATE ROLE**

14 **SEC. 201. TRANSFER TO THE STATES OF RESPONSIBILITY**

15 **AT NON-FEDERAL NATIONAL PRIORITIES**

16 **LIST FACILITIES.**

17 (a) IN GENERAL.—Title I of the Comprehensive En-
18 vironmental Response, Compensation, and Liability Act of
19 1980 (42 U.S.C. 9601 et seq.) (as amended by section
20 103) is amended by adding at the end the following:

21 **“SEC. 130. TRANSFER TO THE STATES OF RESPONSIBILITY**

22 **AT NON-FEDERAL NATIONAL PRIORITIES**

23 **LIST FACILITIES.**

24 “(a) DEFINITIONS.—In this section:

1 “(1) AUTHORIZED STATE.—The term ‘author-
2 ized State’ means a State that is authorized under
3 subsection (c) or (d) to apply State cleanup program
4 requirements, in lieu of the requirements of this Act,
5 to the cleanup of a non-Federal listed facility.

6 “(2) EXPEDITED AUTHORIZATION.—The term
7 ‘expedited authorization’ means authorization pursu-
8 ant to the expedited process under subsection (d) to
9 apply State cleanup program requirements, in lieu of
10 the requirements of this Act, to the cleanup of a
11 non-Federal listed facility.

12 “(3) DELEGABLE AUTHORITY.—The term ‘dele-
13 gable authority’ means authority to perform (or en-
14 sure, by exercise of transferred enforcement author-
15 ity, performance of) all of the authorities included in
16 any 1 or more of the following categories of author-
17 ity:

18 “(A) All authorities necessary to perform
19 technical investigations, evaluations, and risk
20 analyses.

21 “(B) All authorities necessary to perform
22 alternatives development and remedy selection.

23 “(C) All authorities necessary to perform
24 remedial design and remedial action.

1 “(D) All authorities necessary to perform
2 operation and maintenance.

3 “(E) All authorities necessary to perform
4 information collection and allocation of liability.

5 “(4) DELEGATED STATE.—The term ‘delegated
6 State’ means a State to which delegable authority
7 has been delegated under subsection (e), except as
8 may be provided in a delegation agreement in the
9 case of a limited delegation of authority under sub-
10 section (f).

11 “(5) DELEGATED AUTHORITY.—The term ‘dele-
12 gated authority’ means a delegable authority that
13 has been delegated to a delegated State under sub-
14 section (e) or (f).

15 “(6) DELEGATED FACILITY.—The term ‘dele-
16 gated facility’ means a non-Federal listed facility
17 with respect to which a delegable authority has been
18 delegated to a State under subsection (e) or (f).

19 “(7) ENFORCEMENT AUTHORITY.—The term
20 “enforcement authority” means all authorities nec-
21 essary to recover response costs, require potentially
22 responsible parties to perform response actions, and
23 otherwise compel implementation of a response ac-
24 tion, including—

1 “(A) issuance of an order under section
2 106(a);

3 “(B) a response action cost recovery under
4 section 107;

5 “(C) imposition of a civil penalty or award
6 under subsection (a)(1)(D) or (b)(4) of section
7 109;

8 “(D) settlement under section 122;

9 “(E) gathering of information under sec-
10 tion 104(e); and

11 “(F) any other authority identified by the
12 Administrator under subsection (b).

13 “(8) NONDELEGABLE AUTHORITY.—The term
14 ‘nondelegable authority’ means authority to—

15 “(A) make grants to community response
16 organizations under section 117; and

17 “(B) conduct research and development ac-
18 tivities under any provision of this Act.

19 “(9) NON-FEDERAL LISTED FACILITY.—The
20 term ‘non-Federal listed facility’ means a facility
21 that—

22 “(A) is not owned or operated by a depart-
23 ment, agency, or instrumentality of the United
24 States in any branch of the Government; and

1 “(B) is listed on the National Priorities
2 List.

3 “(b) METHODS FOR TRANSFER OF RESPONSIBILITY
4 TO THE STATES.—

5 “(1) IN GENERAL.—The Administrator shall
6 seek, to the extent consistent with the requirement
7 to protect human health and the environment, to
8 transfer to the States the responsibility to perform
9 response actions at non-Federal listed facilities.

10 “(2) METHODS TO ACCOMPLISH TRANSFER.—
11 Responsibility may be transferred to a State by use
12 of 1 or more of the following methods:

13 “(A) Authorization under subsection (c).

14 “(B) Expedited authorization under sub-
15 section (d).

16 “(C) Delegation under subsection (e).

17 “(D) Limited delegation by agreement
18 under subsection (f).

19 “(c) AUTHORIZATION.—

20 “(1) IN GENERAL.—The Administrator may
21 grant to a State authority to apply any or all of the
22 requirements of the State cleanup program in lieu of
23 any or all of the requirements of this Act to the
24 cleanup of a non-Federal listed facility if the State
25 submits to the Administrator such information and

1 documentation as the Administrator may require to
2 enable the Administrator to determine whether and
3 to what extent—

4 “(A) the State has adequate legal author-
5 ity, financial and personnel resources, organiza-
6 tion, and expertise to implement, administer,
7 and enforce a hazardous substance response
8 program;

9 “(B) the State cleanup program will be im-
10 plemented in a manner that is protective of
11 human health and the environment;

12 “(C) the State has procedures to ensure
13 public notice and, as appropriate, opportunity
14 for comment on remedial action plans, consist-
15 ent with section 117; and

16 “(D) the State agrees to exercise its en-
17 forcement authorities to require that persons
18 that are potentially liable under section 107(a),
19 to the extent practicable, perform and pay for
20 the response actions.

21 “(2) ACTION BY THE ADMINISTRATOR.—

22 “(A) IN GENERAL.—The Administrator
23 shall make a determination under paragraph
24 (1) not later than 180 days after receipt from

1 a State of information and documentation
2 under paragraph (1).

3 “(B) FAILURE TO ACT.—If the Adminis-
4 trator does not make a determination under
5 paragraph (1) within 180 days after receipt
6 from a State of information and documentation
7 under paragraph (1), the transfer of respon-
8 sibility sought by the State shall be deemed to
9 have been granted.

10 “(d) EXPEDITED AUTHORIZATION.—

11 “(1) IN GENERAL.—A State that, as of the date
12 of a certification under paragraph (3), has a State
13 cleanup program that meets any 3 of the criteria
14 stated in paragraph (2)—

15 “(A) shall be conclusively presumed to
16 have the ability to properly effect the cleanup of
17 a non-Federal listed facility; and

18 “(B) on the date that is 90 days after the
19 date of receipt by the Administrator of a certifi-
20 cation under paragraph (3), unless the Admin-
21 istrator has provided notification under para-
22 graph (4)(B), operate the State hazardous sub-
23 stance response program in lieu of the Federal
24 response action authorities of this Act to the
25 cleanup of a non-Federal listed facility.

1 “(2) CRITERIA.—The criteria stated in this
2 paragraph are as follows:

3 “(A) 10 YEARS’ EXPERIENCE.—A State
4 cleanup program to remediate hazardous waste
5 sites has been in effect for at least 10 years be-
6 fore the date of a certification under paragraph
7 (3).

8 “(B) SUBSTANTIAL EXPENSES INCURRED
9 OR OBLIGATED.—Since the date on which a
10 State cleanup program to remediate hazardous
11 waste sites went into effect, the State has ex-
12 pended or obligated at least \$10,000,000 from
13 its State cleanup fund or other State source of
14 cleanup funding (including direct appropria-
15 tions).

16 “(C) 100 EMPLOYEES.—The State cleanup
17 program has at least 100 full-time equivalent
18 employees.

19 “(D) 200 RESPONSE ACTIONS PER-
20 FORMED.—At least 200 response actions at fa-
21 cilities not listed on the National Priorities List
22 have been performed under the State cleanup
23 program.

1 “(E) LARGE NUMBER OF NON-FEDERAL
2 LISTED FACILITIES.—There are located in the
3 State—

4 “(i) at least 100 non-Federal listed
5 facilities; or

6 “(ii) 6 non-Federal listed facilities per
7 million State residents.

8 “(3) CERTIFICATION BY A STATE.—A State
9 that desires to seek expedited authorization shall
10 submit to the Administrator a certification that—

11 “(A) specifies the criteria stated in para-
12 graph (2) that are met by the State cleanup
13 program; and

14 “(B) affirms with particularity that the
15 certification requirements stated in subpara-
16 graphs (A) through (D) of subsection (c)(1) are
17 met.

18 “(4) REVIEW OF CERTIFICATION.—

19 “(A) LIMITED REVIEW.—The Adminis-
20 trator shall review a certification under para-
21 graph (3) solely for the purposes of—

22 “(i) determining whether the certifi-
23 cation is complete and accurate; and

1 “(ii) confirming that the State clean-
2 up program in fact meets 3 of the criteria
3 stated in paragraph (2).

4 “(B) INCOMPLETE OR INACCURATE CER-
5 TIFICATION.—If the Administrator determines
6 that a certification under paragraph (3) is in-
7 complete or inaccurate in its certification that
8 the State cleanup program meets 3 of the cri-
9 teria stated in paragraph (2), the Administrator
10 shall notify the Governor of the State of the in-
11 validity of the certification not later than 90
12 days after the date of receipt of the certifi-
13 cation.

14 “(C) ACTION BY THE ADMINISTRATOR.—

15 “(i) IN GENERAL.—Except as pro-
16 vided in clause (ii), the Administrator shall
17 complete review of a certification under
18 paragraph (3) not later than 90 days after
19 receipt of the certification or, if the Ad-
20 ministrator gives the State notice of an in-
21 complete or inaccurate certification, after
22 the date on which the State submits addi-
23 tional information.

24 “(ii) EXTENSION OF TIME.—If the
25 Administrator determines that there is

1 good cause for extending the period in
2 which review of a certification under para-
3 graph (3) may be completed and notifies
4 the State of the determination, the Admin-
5 istrator may extend the period for not
6 more than 90 additional days.

7 “(D) CONCLUSIVE VALIDITY OF CERTIFI-
8 CATION.—If the Administrator does not com-
9 plete review of a certification within the period
10 provided under subparagraph (C), the certifi-
11 cation shall not thereafter be subject to chal-
12 lenge by the Administrator or any other person
13 in any Federal or State administrative or judi-
14 cial proceeding.

15 “(e) DELEGATION OF AUTHORITY.—

16 “(1) IN GENERAL.—Pursuant to an approved
17 State application, the Administrator shall delegate
18 authority to perform 1 or more delegable authorities
19 with respect to 1 or more non-Federal listed facili-
20 ties in the State.

21 “(2) IDENTIFICATION OF DELEGABLE AU-
22 THORITIES.—

23 “(A) IN GENERAL.—Not later than 1 year
24 after the date of enactment of this section, the
25 President shall by regulation identify all of the

1 authorities of the Administrator that shall be
2 included in a delegation of any category of dele-
3 gable authority described in subsection (a)(2).

4 “(B) LIMITATION.—The Administrator
5 shall not identify a nondelegable authority for
6 inclusion in a delegation of any category of del-
7 egable authority.

8 “(C) ENFORCEMENT AUTHORITIES.—A
9 State seeking a delegation under this sub-
10 section—

11 “(i) in addition to meeting the re-
12 quirements of paragraph (3), shall dem-
13 onstrate that the State’s enforcement au-
14 thorities are equivalent to the enforcement
15 authorities under this Act; and

16 “(ii) shall use the State’s enforcement
17 authorities in carrying out delegable au-
18 thorities.

19 “(3) APPLICATION.—An application under
20 paragraph (1) shall—

21 “(A) identify each non-Federal listed facil-
22 ity for which delegation is requested;

23 “(B) identify each delegable authority that
24 is requested to be delegated for each non-Fed-

1 eral listed facility for which delegation is re-
2 quested; and

3 “(C) include such information and docu-
4 mentation as the Administrator may require to
5 enable the Administrator to determine whether
6 and to what extent—

7 “(i) the State has adequate financial
8 and personnel resources, organization, and
9 expertise to implement, administer, and en-
10 force a hazardous substance response pro-
11 gram;

12 “(ii) the State will implement the del-
13 egated authorities in a manner that is pro-
14 tective of human health and the environ-
15 ment; and

16 “(iii) the State agrees to exercise its
17 delegated authorities to require that per-
18 sons that are potentially liable under sec-
19 tion 107(a), to the extent practicable, per-
20 form and pay for the response actions.

21 “(4) APPROVAL OF APPLICATION.—

22 “(A) IN GENERAL.—Not later than 120
23 days after receiving an application from a State
24 (unless the State agrees to a greater length of

1 time for the Administrator to make a deter-
2 mination), the Administrator shall—

3 “(i) issue a notice of approval of the
4 application (including approval or dis-
5 approval regarding any or all of the facili-
6 ties with respect to which a delegation of
7 authority is requested or with respect to
8 any or all of the authorities that are re-
9 quested to be delegated); or

10 “(ii) if the Administrator determines
11 that the State does not have adequate legal
12 authority, financial and personnel re-
13 sources, organization, or expertise to ad-
14 minister and enforce any of the requested
15 delegable authority, issue a notice of dis-
16 approval, including an explanation of the
17 basis for the determination.

18 “(B) FAILURE TO ACT.—If the Adminis-
19 trator does not issue a notice of approval or no-
20 tice of disapproval of all or any portion of an
21 application within the applicable time period
22 under subparagraph (A), the application shall
23 be deemed to have been granted.

24 “(C) RESUBMISSION OF APPLICATION.—

1 “(i) IN GENERAL.—If the Adminis-
2 trator disapproves an application under
3 paragraph (4), the State may resubmit the
4 application at any time after receiving the
5 notice of disapproval.

6 “(ii) FAILURE TO ACT.—If the Ad-
7 ministrator does not issue a notice of ap-
8 proval or notice of disapproval of a resub-
9 mitted application within the applicable
10 time period under subparagraph (A), the
11 resubmitted application shall be deemed to
12 have been granted.

13 “(D) NO ADDITIONAL TERMS OR CONDI-
14 TIONS.—The Administrator shall not impose
15 any term or condition on the approval of an ap-
16 plication that meets the requirements stated in
17 paragraph (3) (except a requirement that any
18 technical deficiencies in the application be cor-
19 rected).

20 “(E) JUDICIAL REVIEW.—The State (but
21 no other person) shall be entitled to judicial re-
22 view under section 113(b) of a disapproval of a
23 resubmitted application.

24 “(5) DELEGATION AGREEMENT.—On approval
25 of a delegation of authority under this section, the

1 Administrator and the delegated State shall enter
2 into a delegation agreement that identifies each cat-
3 egory of delegable authority that is delegated with
4 respect to each delegated facility.

5 “(f) LIMITED DELEGATION BY AGREEMENT.—The
6 Administrator may enter into an agreement with a State
7 that does not meet the requirements of subsection (c), (d),
8 or (e), or a State that does not seek authorization, expe-
9 dited authorization, or delegation under those subsections,
10 under which the Administrator delegates to the State lim-
11 ited authority to perform, ensure the performance of, or
12 supervise or otherwise participate in the performance of
13 1 or more delegable authorities, as appropriate in view of
14 the extent to which the State has the required legal au-
15 thority, financial and personnel resources, organization,
16 and expertise and the Administrator is satisfied that the
17 delegable authorities will be implemented in a manner that
18 is protective of human health and the environment.

19 “(g) PERFORMANCE OF TRANSFERRED RESPON-
20 SIBILITIES.—

21 “(1) IN GENERAL.—A State to which respon-
22 sibility is transferred under subsection (c), (d), (e),
23 or (f) shall have sole authority (except as provided
24 in subsection (h)) to perform the transferred respon-
25 sibility.

1 “(2) COMPLIANCE WITH ACT.—A delegated
2 State shall implement each applicable provision of
3 this Act (including regulations and guidance issued
4 by the Administrator) so as to perform each dele-
5 gated authority with respect to a delegated facility
6 in the same manner as would the Administrator with
7 respect to a facility that is not a delegated facility.

8 “(h) RETAINED FEDERAL AUTHORITIES.—

9 “(1) WITHDRAWAL OF TRANSFER OF RESPON-
10 SIBILITY.—

11 “(A) IN GENERAL.—If at any time the Ad-
12 ministrator finds that contrary to a certification
13 made under subsection (c), (d), or (e), a State
14 to which responsibility at a non-Federal listed
15 facility has been transferred under this sec-
16 tion—

17 “(i) lacks the required financial and
18 personnel resources, organization, or exper-
19 tise to administer and enforce the trans-
20 ferred responsibilities;

21 “(ii) does not have adequate legal au-
22 thority to perform the transferred respon-
23 sibilities;

24 “(iii) is failing to materially carry out
25 the State’s transferred responsibilities; or

1 “(iv) is failing to operate its State
2 cleanup program or exercise transferred re-
3 sponsibility in such a manner as to be pro-
4 tective of human health and the environ-
5 ment as required under section 121;
6 the Administrator may withdraw the transfer of
7 responsibility after providing notice and oppor-
8 tunity to correct deficiencies under subpara-
9 graph (C).

10 “(B) STATES WITH LIMITED DELEGATIONS
11 BY AGREEMENT.—If the Administrator finds
12 that a State to which a limited delegation of au-
13 thority was made by agreement under sub-
14 section (f) has materially breached the limited
15 delegation agreement, the Administrator may
16 withdraw the delegation after providing notice
17 and opportunity to correct deficiencies under
18 subparagraph (C).

19 “(C) NOTICE AND OPPORTUNITY TO COR-
20 RECT.—If the Administrator proposes to with-
21 draw a transfer of responsibility for any or all
22 non-Federal listed facilities, the Administrator
23 shall give the State written notice and allow the
24 State at least 90 days after the date of receipt

1 of the notice to correct the deficiencies cited in
2 the notice.

3 “(D) FAILURE TO CORRECT.—If the Ad-
4 ministrator finds that the deficiencies have not
5 been corrected within the time specified in a no-
6 tice under subparagraph (C), the Administrator
7 may withdraw the transfer of responsibility
8 after providing public notice and opportunity
9 for comment.

10 “(E) JUDICIAL REVIEW.—A decision of the
11 Administrator to withdraw a transfer of respon-
12 sibility shall be subject to judicial review under
13 section 113(b).

14 “(2) NO EFFECT ON CERTAIN AUTHORITIES.—
15 Nothing in this section affects the authority of the
16 Administrator under this Act to—

17 “(A) perform a response action at a facil-
18 ity listed on the National Priorities List in a
19 State to which a transfer of responsibility has
20 not been made under this section or at a facility
21 not included in a transfer of responsibility; or

22 “(B) perform any element of a response
23 action with respect to a non-Federal listed facil-
24 ity that is not included among the responsibil-

1 ities transferred to a State with respect to the
2 facility.

3 “(3) FEDERAL REMOVAL AUTHORITY.—

4 “(A) NOTICE.—Before performing an
5 emergency removal action under section 104 at
6 a non-Federal listed facility at which respon-
7 sibility has been transferred to a State, the Ad-
8 ministrator shall notify the State of the Admin-
9 istrator’s intention to perform the removal.

10 “(B) STATE ACTION.—If, within 48 hours
11 after receiving a notification under subpara-
12 graph (A), the State notifies the Administrator
13 that the State intends to take action to perform
14 an emergency removal at the non-Federal listed
15 facility, the Administrator shall not perform the
16 emergency removal action unless the Adminis-
17 trator determines that the State has failed to
18 act within a reasonable period of time to per-
19 form the emergency removal.

20 “(C) PUBLIC HEALTH OR ENVIRONMENTAL
21 EMERGENCY.—If the Administrator finds that
22 any release or threat of release constitutes a
23 public health or environmental emergency under
24 section 104(a)(4)—

1 “(i) the Administrator shall not be re-
2 quired to provide notice under subpara-
3 graph (A); and

4 “(ii) the Administrator shall act in ac-
5 cordance with section 104(a)(4).

6 “(4) FEDERAL ENFORCEMENT AUTHORITY.—

7 “(A) IN GENERAL.—In the case of a non-
8 Federal listed facility at which—

9 “(i) there has been a transfer of re-
10 sponsibility under this section; and

11 “(ii) there is a release or threatened
12 release of a hazardous substance, pollut-
13 ant, or contaminant;

14 neither the President nor any other person may
15 use any authority under this Act to take an ad-
16 ministrative or judicial enforcement action or to
17 bring a private civil action against any person
18 regarding any matter that is within the scope of
19 the transfer of responsibility, except as provided
20 in subparagraph (B).

21 “(B) EXCEPTIONS.—The President may
22 bring an administrative or judicial enforcement
23 action with respect to a non-Federal listed facil-
24 ity under this Act if—

1 “(i) the State requests that the Presi-
2 dent provide assistance in the performance
3 of a response action and that the enforce-
4 ment bar in subparagraph (A) be lifted; or

5 “(ii) after providing the Governor of
6 the State notice and a reasonable oppor-
7 tunity to cure, the Administrator—

8 “(I) makes a determination that
9 the State is unwilling or unable to
10 take appropriate action at a facility at
11 which there is an imminent threat of
12 actual exposure of a hazardous sub-
13 stance to humans or the environment;
14 and

15 “(II) obtains a declaratory judg-
16 ment in United States district court
17 that the State has failed to make rea-
18 sonable progress in performance of a
19 remedial action at the facility.

20 “(5) COST RECOVERY.—

21 “(A) RECOVERY BY A TRANSFEREE
22 STATE.—Of the amount of any response costs
23 recovered from a responsible party by a State
24 that is transferred responsibility at a non-fed-
25 eral listed facility under section.107—

1 “(i) 25 percent of the amount of any
2 Federal response cost recovered with re-
3 spect to a facility, plus an amount equal to
4 the amount of response costs incurred by
5 the State with respect to the facility, may
6 be retained by the State; and

7 “(ii) the remainder shall be deposited
8 in the Hazardous Substances Superfund
9 established under subchapter A of chapter
10 98 of the Internal Revenue Code of 1986.

11 “(B) RECOVERY BY THE ADMINIS-
12 TRATOR.—

13 “(i) IN GENERAL.—The Administrator
14 may take action under section 107 to re-
15 cover response costs from a potentially re-
16 sponsible party for a non-federal listed fa-
17 cility for which responsibility is transferred
18 to a State if—

19 “(I) the State notifies the Ad-
20 ministrator in writing that the State
21 does not intend to pursue action for
22 recovery of response costs under sec-
23 tion 107 against the potentially re-
24 sponsible party; or

1 “(II) the State fails to take ac-
2 tion to recover response costs within a
3 reasonable time in light of applicable
4 statutes of limitation.

5 “(ii) NOTICE.—If the Administrator
6 proposes to commence an action for recov-
7 ery of response costs under section 107,
8 the Administrator shall give the State writ-
9 ten notice and allow the State at least 90
10 days after receipt of the notice to com-
11 mence the action.

12 “(iii) NO FURTHER ACTION.—If the
13 Administrator takes action against a po-
14 tentially responsible party under section
15 107 relating to a release from a non-Fed-
16 eral listed facility after providing a State
17 notice under clause (ii), the State may not
18 take any other action for recovery of re-
19 sponse costs relating to that release under
20 this Act or any other Federal or State law.

21 “(6) DELISTING OF NATIONAL PRIORITY LIST
22 FACILITIES.—

23 “(A) DELISTING REQUEST.—A State may
24 request that the Administrator remove from the
25 National Priorities List all or part of a facility

1 to which responsibility has been transferred to
2 the State under this section.

3 “(B) ACTION BY THE ADMINISTRATOR.—
4 The Administrator shall—

5 “(i) promptly consider a request
6 under subparagraph (A); and

7 “(ii) remove the facility or part of the
8 facility from the National Priorities List
9 unless the delisting would be inconsistent
10 with a requirement of this Act.

11 “(C) DENIAL OF REQUEST.—If the Admin-
12 istrator decides to deny a request for delisting
13 under subparagraph (A), the Administrator
14 shall publish the decision in the Federal Reg-
15 ister with an explanation of the reasons for the
16 denial.

17 “(D) REPORT.—At the end of each cal-
18 endar year, the Administrator shall submit to
19 Congress a report describing actions taken
20 under this paragraph during the year.

21 “(i) FUNDING.—

22 “(1) IN GENERAL.—The Administrator shall
23 provide grants to or enter into contracts or coopera-
24 tive agreements with States to which responsibility
25 has been transferred under this section.

1 “(2) NO CLAIM AGAINST FUND.—Notwithstand-
2 ing any other law, funds to be granted under this
3 subsection shall not constitute a claim against the
4 Fund or the United States.

5 “(3) INSUFFICIENT FUNDS AVAILABLE.—If
6 funds are unavailable in any fiscal year to satisfy all
7 commitments made under this section by the Admin-
8 istrator, the Administrator shall have sole authority
9 and discretion to establish priorities and to delay
10 payments until funds are available.

11 “(4) DETERMINATION OF COSTS ON A FACIL-
12 ITY-SPECIFIC BASIS.—The Administrator shall—

13 “(A) determine—

14 “(i) the functions or responsibilities
15 associated with a transfer of responsibility
16 the costs of performing which it is prac-
17 ticable to determine on a facility-specific
18 basis; and

19 “(ii) the functions or responsibilities
20 associated with a transfer of responsibility
21 the costs of performing which it is not
22 practicable to determine on a facility-spe-
23 cific basis; and

24 “(B) publish a list describing the functions
25 and responsibilities in each category.

1 “(5) FACILITY-SPECIFIC GRANTS.—The costs
2 described in paragraph (4)(A)(ii) shall be funded as
3 such costs arise with respect to each non-Federal
4 listed facility for which responsibility has been trans-
5 ferred to a State under this section.

6 “(6) NONFACILITY-SPECIFIC GRANTS.—

7 “(A) IN GENERAL.—The costs described in
8 paragraph (4)(A)(ii) shall be funded through
9 nonfacility-specific grants under this paragraph.

10 “(B) FORMULA.—The Administrator shall
11 establish a formula under which funds available
12 for nonfacility-specific grants shall be allocated
13 among the States to which responsibility has
14 been transferred under this section, taking into
15 consideration—

16 “(i) the costs of performing the trans-
17 ferred responsibilities;

18 “(ii) the number of facilities for which
19 each State has been transferred respon-
20 sibility;

21 “(iii) the types of activities for which
22 each State has been transferred respon-
23 sibility;

1 “(iv) the number of facilities in each
2 State that are listed on the National Prior-
3 ities List;

4 “(v) the need for the development of
5 the State programs;

6 “(vi) the need for additional person-
7 nel;

8 “(vii) the amount of resources avail-
9 able through State programs for the clean-
10 up of contaminated facilities; and

11 “(viii) the benefit to human health
12 and the environment of providing the fund-
13 ing.

14 “(7) PERMITTED USE OF GRANT FUNDS.—A
15 State to which responsibility has been transferred
16 under this section may use grant funds, in accord-
17 ance with this Act and the National Contingency
18 Plan, to take any action or perform any duty nec-
19 essary to implement the authority delegated to the
20 State under this section.

21 “(8) COST SHARE.—A State receiving a grant
22 under this subsection—

23 “(A) shall provide an assurance that the
24 State will pay any amount required under sec-
25 tion 104(c)(3); and

1 “(B) may not use grant funds to pay any
2 amount required under section 104(c)(3).

3 “(9) CERTIFICATION OF USE OF FUNDS.—

4 “(A) IN GENERAL.—Not later than 1 year
5 after the date on which a State receives funds
6 under this subsection, and annually thereafter,
7 the Governor of the State shall submit to the
8 Administrator—

9 “(i) a certification that the State has
10 used the funds in accordance with the re-
11 quirements of this Act and the National
12 Contingency Plan; and

13 “(ii) information describing the man-
14 ner in which the State used the funds.

15 “(B) REVIEW OF USE OF FUNDS.—

16 “(i) IN GENERAL.—The Administrator
17 shall review a certification submitted by
18 the Governor under subparagraph (A) not
19 later than 120 days after the date of its
20 submission.

21 “(ii) FINDING OF USE OF FUNDS IN-
22 CONSISTENT WITH THIS ACT.—If the Ad-
23 ministrator finds that funds were used in
24 a manner that is inconsistent with this
25 Act, the Administrator shall notify the

61

1 Governor in writing not later than 120
2 days after receiving the Governor's certifi-
3 cation.

4 “(iii) EXPLANATION.—Not later than
5 30 days after receiving a notice under
6 clause (ii), the Governor shall—

7 “(I) explain why the finding of
8 the Administrator is in error; or

9 “(II) explain to the satisfaction
10 of the Administrator how any
11 misapplication or misuse of funds will
12 be corrected.

13 “(iv) FAILURE TO EXPLAIN.—If the
14 Governor fails to make an explanation
15 under clause (iii) to the satisfaction of the
16 Administrator, the Administrator may re-
17 quest reimbursement of such amount of
18 funds as the Administrator finds was mis-
19 applied or misused.

20 “(v) REPAYMENT OF FUNDS.—If the
21 Administrator fails to obtain reimburse-
22 ment from the State within a reasonable
23 period of time, the Administrator may,
24 after 30 days' notice to the State, bring a
25 civil action in United States district court

1 to recover from the transferee State any
2 funds that were advanced for a purpose or
3 were used for a purpose or in a manner
4 that is inconsistent with this Act.

5 “(C) REGULATIONS.—Not later than 1
6 year after the date of enactment of this section,
7 the Administrator shall promulgate a regulation
8 describing with particularity the information
9 that a State shall be required to provide under
10 subparagraph (A)(ii).

11 “(j) COOPERATIVE AGREEMENTS.—Nothing in this
12 section affects the authority of the Administrator under
13 section 104(d)(1) to enter into a cooperative agreement
14 with a State, a political subdivision of a State, or an In-
15 dian tribe to carry out actions under section 104.”.

16 (b) STATE COST SHARE.—Section 104(c) of the
17 Comprehensive Environmental Response, Compensation,
18 and Liability Act of 1980 (42 U.S.C. 9604(c)) is amend-
19 ed—

20 (1) by striking “(c)(1) Unless” and inserting
21 the following:

22 “(c) MISCELLANEOUS LIMITATIONS AND REQUIRE-
23 MENTS.—

24 “(1) CONTINUANCE OF OBLIGATIONS FROM
25 FUND.—Unless”;

1 (2) by striking “(2) The President” and insert-
2 ing the following:

3 “(2) CONSULTATION.—The President”; and
4 (3) by striking paragraph (3) and inserting the
5 following:

6 “(3) STATE COST SHARE.—

7 “(A) IN GENERAL.—The Administrator
8 shall not provide any remedial action under this
9 section unless the State in which the release oc-
10 curs first enters into a contract or cooperative
11 agreement with the Administrator providing as-
12 surances deemed adequate by the Administrator
13 that the State will pay, in cash or through in-
14 kind contributions, a specified percentage of the
15 costs of the remedial action and operation and
16 maintenance costs.

17 “(B) ACTIVITIES WITH RESPECT TO
18 WHICH STATE COST SHARE IS REQUIRED.—No
19 State cost share shall be required except for re-
20 medial actions under section 104.

21 “(C) SPECIFIED PERCENTAGE.—

22 “(i) IN GENERAL.—The specified per-
23 centage of costs that a State shall be re-
24 quired to share shall be the lower of 10

1 percent or the percentage determined
2 under clause (ii).

3 “(ii) MAXIMUM IN ACCORDANCE WITH
4 LAW PRIOR TO DATE OF ENACTMENT OF
5 THIS SUBPARAGRAPH.—

6 “(I) IN GENERAL.—On petition
7 by a State, the Director of the Office
8 of Management and Budget (referred
9 to in this clause as the ‘Director’),
10 after providing public notice and op-
11 portunity for comment, shall establish
12 a cost share percentage, which shall
13 be uniform for all facilities in the
14 State, at the percentage rate at which
15 the total amount of anticipated pay-
16 ments by the State under the cost
17 share for all facilities in the State for
18 which a cost share is required most
19 closely approximates the total amount
20 of estimated cost share payments by
21 the State for facilities that would have
22 been required under cost share re-
23 quirements that were applicable before
24 the date of enactment of this subpara-
25 graph, adjusted to reflect the extent

1 to which the State's ability to recover
2 costs under this Act were reduced by
3 reason of enactment of amendments
4 to this Act by the Superfund Cleanup
5 Acceleration Act of 1997.

6 “(II) ADJUSTMENTS.—The Di-
7 rector may adjust a State's cost share
8 under this clause not more frequently
9 than every 3 years.

10 “(D) INDIAN TRIBES.—In the case of re-
11 medial action to be taken on land or water held
12 by an Indian Tribe, held by the United States
13 in trust for an Indian tribe, held by a member
14 of an Indian Tribe (if the land or water is sub-
15 ject to a trust restriction on alienation), or oth-
16 erwise within the borders of an Indian reserva-
17 tion, the requirements of this paragraph shall
18 not apply.”.

19 (c) USES OF FUND.—Section 111(a) of the Com-
20 prehensive Environmental Response, Compensation, and
21 Liability Act of 1980 (42 U.S.C. 9611(a)) is amended by
22 inserting after paragraph (6) the following:

23 “(7) GRANTS TO DELEGATED STATES.—Making
24 a grant to a delegated State under section 130(f).”.

25 (d) RELATIONSHIP TO OTHER LAWS.—

1 (1) IN GENERAL.—Section 114(b) of the Com-
2 prehensive Environmental Response, Compensation,
3 and Liability Act of 1980 (42 U.S.C. 9614(b)) is
4 amended by striking “removal” each place it appears
5 and inserting “response”.

6 (2) CONFORMING AMENDMENT.—Section
7 101(37)(B) of the Comprehensive Environmental
8 Response, Compensation, and Liability Act of 1980
9 (42 U.S.C. 9601(37)(B)) is amended by striking
10 “section 114(c)” and inserting “section 114(b)”.

11 **TITLE III—LOCAL COMMUNITY**
12 **PARTICIPATION**

13 **SEC. 301. DEFINITIONS.**

14 (a) IN GENERAL.—Section 117 of the Comprehensive
15 Environmental Response, Compensation, and Liability Act
16 of 1980 (42 U.S.C. 9617) is amended—

17 (1) by redesignating subsections (a) through (e)
18 as subsections (b) through (f), respectively; and

19 (2) by inserting after the section heading the
20 following:

21 “(a) DEFINITIONS.—In this section:

22 “(1) AFFECTED COMMUNITY.—The term ‘af-
23 fected community’ means a group of 2 or more indi-
24 viduals who may be affected by the release or threat-

1 ened release of a hazardous substance, pollutant, or
2 contaminant from a covered facility.

3 “(2) COVERED FACILITY.—The term ‘covered
4 facility’ means a facility—

5 “(A) that has been listed or proposed for
6 listing on the National Priorities List; or

7 “(B) at which the President is undertaking
8 a removal action that is expected to exceed—

9 “(i) in duration, 1 year; or

10 “(ii) in cost, the funding limit estab-
11 lished under section 104(c)(1).”.

12 (b) CONFORMING AMENDMENTS.—

13 (A) Title I of the Comprehensive Environ-
14 mental Response, Compensation, and Liability
15 Act of 1980 is amended—

16 (i) in section 111(a)(5) (42 U.S.C.
17 9611), by striking “117(e)” and inserting
18 “117(f”;

19 (ii) in section 113(k)(2)(B) (42
20 U.S.C. 9613)—

21 (I) in clause (iii), by striking
22 “117(a)(2)” and inserting
23 “117(b)(2”;

1 (II) in the third sentence, by
2 striking “117(d)” and inserting
3 “117(e)”.

4 (B) Section 2705(e) of title 10, United
5 States Code, is amended—

6 (i) by striking “117(e)” and inserting
7 “117(f)”; and

8 (ii) by striking “(42 U.S.C. 9617(e))”
9 and inserting “(42 U.S.C. 9617(f))”.

10 **SEC. 302. PUBLIC PARTICIPATION GENERALLY.**

11 Section 117 of the Comprehensive Environmental Re-
12 sponse, Compensation, and Liability Act of 1980 (42
13 U.S.C. 9617) (as amended by section 301(b)) is amend-
14 ed—

15 (1) in subsection (b)(2), by inserting “, ade-
16 quate notice,” after “oral comments”;

17 (2) in the first sentence of subsection (e), by
18 striking “major”; and

19 (3) by striking subsection (f) and inserting the
20 following:

21 “(f) AVAILABILITY OF RECORDS.—

22 “(1) IN GENERAL.—Except as provided in para-
23 graph (2), throughout all phases of a response ac-
24 tion at a facility and without the need to file a re-
25 quest under section 552 of title 5, United States

1 Code, the President shall make available to the af-
2 fected community (including the recipient of a tech-
3 nical assistance grant (if a grant has been awarded
4 under subsection (i)) or a community advisory group
5 (if a community advisory group has been estab-
6 lished)), for inspection and, subject to reasonable
7 fees, for copying, all records relating to a release or
8 threatened release of a hazardous substance, pollut-
9 ant, or contaminant at the facility that—

10 “(A) are in the possession or control of the
11 United States; and

12 “(B) do not relate to liability.

13 “(2) EXEMPT RECORDS.—Paragraph (1) shall
14 not apply to—

15 “(A) a record that is exempt from disclo-
16 sure under section 552 of title 5, United States
17 Code;

18 “(B) a record that would be subject to the
19 prohibition on disclosure under section
20 104(e)(7) if the record were obtained under sec-
21 tion 104; or

22 “(C) a record that is exchanged between
23 parties to a dispute under this Act for the pur-
24 pose of settling the dispute.”.

1 **SEC. 303. IMPROVEMENT OF PUBLIC PARTICIPATION IN**
2 **THE SUPERFUND DECISIONMAKING PROC-**
3 **ESS; LOCAL COMMUNITY ADVISORY GROUPS;**
4 **TECHNICAL ASSISTANCE GRANTS.**

5 Section 117 of the Comprehensive Environmental Re-
6 sponse, Compensation, and Liability Act of 1980 (42
7 U.S.C. 9617) (as amended by section 301(b)(1)) is
8 amended by adding at the end the following:

9 “(g) IMPROVEMENT OF PUBLIC PARTICIPATION IN
10 DECISIONMAKING PROCESS.—

11 “(1) VIEWS AND PREFERENCES.—

12 “(A) SOLICITATION.—To the extent rea-
13 sonably possible, in addition to the solicitation
14 of public comments on a proposed remedial ac-
15 tion plan under subsection (b)(2), the President
16 shall—

17 “(i) disseminate information to the
18 local community;

19 “(ii) solicit information from the local
20 community;

21 “(iii) consider the views of the local
22 community during the response action
23 process (including a response under sub-
24 section (h)(4)(A)); and

25 “(iv) include, in any administrative
26 record established under section 113(k),

1 the views of the local community and the
2 response of the Administrator to any sig-
3 nificant comments, criticisms, or new data
4 submitted in a written or oral presentation.

5 “(B) CONSULTATION.—The President
6 shall consult with a local community advisory
7 group, if a local community advisory group has
8 been established under subsection (h), and with
9 members of the affected community to deter-
10 mine methods of soliciting the views of the local
11 community and the timing of public meetings.

12 “(C) NOTIFICATION.—The President shall
13 notify the local community and local govern-
14 ment concerning—

15 “(i) the schedule for commencement
16 of construction activities at a covered facil-
17 ity and the location and availability of con-
18 struction plans;

19 “(ii) the results of the any review
20 under section 121(e) and any modifications
21 to the covered facility made as a result of
22 the review; and

23 “(iii) the execution of and any revi-
24 sion to institutional controls being used as
25 part of a remedial action.

1 “(2) MEETINGS BETWEEN LEAD AGENCY AND
2 POTENTIALLY RESPONSIBLE PARTIES.—The Presi-
3 dent, on a regular basis, shall inform local govern-
4 ment officials, a local community advisory group (if
5 any) and, to the extent practicable, interested mem-
6 bers of the affected community of the progress and
7 substance of technical meetings between the lead
8 agency and potentially responsible parties regarding
9 a covered facility.

10 “(3) REMEDIAL ACTION ALTERNATIVES.—A
11 member of the local community may propose a reme-
12 dial action alternative in the same manner as any
13 other interested party may propose a remedial action
14 alternative.

15 “(h) COMMUNITY ADVISORY GROUPS.—

16 “(1) NOTICE.—The President shall, to the ex-
17 tent practicable, provide notice of an opportunity to
18 form a community advisory group to members of the
19 affected community, particularly persons that are
20 immediately proximate to or that may have been af-
21 fected by a release or threatened release.

22 “(2) ESTABLISHMENT.—The President shall as-
23 sist in the establishment of a community advisory
24 group for a covered facility to achieve direct, regu-
25 lar, and meaningful communication among members

1 of the local community throughout the response ac-
2 tion process—

3 “(A) at the request of at least 20 individ-
4 uals residing in, or at least 10 percent of the
5 population of, the area in which the facility is
6 located;

7 “(B) if there is no request under subpara-
8 graph (A), at the request of any local govern-
9 ment with jurisdiction over the facility; or

10 “(C) if the President determines that a
11 community advisory group would be helpful to
12 achieve the purposes of this Act.

13 “(3) RESPONSIBILITIES OF A COMMUNITY ADVI-
14 SORY GROUP.—A community advisory group shall—

15 “(A) solicit the views of the local commu-
16 nity on various issues affecting the development
17 and implementation of response actions at the
18 facility;

19 “(B) serve as a conduit for information be-
20 tween the local community and other entities
21 represented on the community advisory group;

22 “(C) present the views of the local commu-
23 nity throughout the response process; and

24 “(D) provide the local community reason-
25 able notice of and opportunities to participate

1 in the meetings and other activities of the com-
2 munity advisory group.

3 “(4) RESPONSIBILITIES OF THE PRESIDENT.—

4 “(A) CONSULTATION.—The President
5 shall—

6 “(i) consult with the community advi-
7 sory group in developing and implementing
8 the response action for a covered facility,
9 including consultation with respect to—

10 “(I) activities to be included in
11 the facility work plan and remedial in-
12 vestigation;

13 “(II) assumptions regarding rea-
14 sonably anticipated future land uses;

15 “(III) potential remedial alter-
16 natives; and

17 “(IV) selection and implementa-
18 tion of removal and remedial actions
19 (including operation and maintenance
20 activities) and reviews performed
21 under section 121(c);

22 “(ii) keep the community advisory
23 group informed of progress in the develop-
24 ment and implementation of the response
25 action; and

1 “(iii) on request, provide to any per-
2 son the hazard ranking score of any facil-
3 ity that has been scored under the hazard-
4 ous ranking system, and the preliminary
5 assessment and site inspection for the fa-
6 cility.

7 “(B) CONSIDERATION OF COMMENTS.—
8 The President shall consider comments, infor-
9 mation, and recommendations that the commu-
10 nity advisory group provides in a timely man-
11 ner.

12 “(C) CONSENSUS.—The community advi-
13 sory group shall attempt to achieve consensus
14 among its members before providing comments
15 and recommendations to the President. If con-
16 sensus cannot be reached, the community advi-
17 sory group shall report or allow presentation of
18 divergent views.

19 “(5) COMPOSITION OF COMMUNITY ADVISORY
20 GROUPS.—

21 “(A) MEMBERS.—

22 “(i) MEMBERS.—The President shall,
23 to the extent practicable, ensure that the
24 membership of a community advisory
25 group reflects the composition of the af-

1 affected community and a diversity of inter-
2 ests.

3 “(ii) REPRESENTED GROUPS.—A
4 community advisory group for a covered
5 facility shall include at least 1 representa-
6 tive of the recipients of a technical assist-
7 ance grant, if any has been awarded with
8 respect to the facility, and shall include, to
9 the extent practicable, a person from each
10 of the following groups:

11 “(I) Persons who reside or own
12 residential property near the facility.

13 “(II) Persons who, although they
14 may not reside or own property near
15 the facility, may be affected by the fa-
16 cility contamination.

17 “(III) Local public health practi-
18 tioners or medical practitioners (par-
19 ticularly those who are practicing in
20 the affected community).

21 “(IV) Local Indian communities
22 that may be affected by the facility
23 contamination.

24 “(V) Local citizen, civic, environ-
25 mental, or public interest groups.

1 “(VI) Members of the local busi-
2 ness community.

3 “(VII) Employees at the facility
4 during facility operation.

5 “(B) LOCAL RESIDENTS.—Local commu-
6 nity members shall comprise a majority of the
7 voting membership of a community advisory
8 group.

9 “(C) NUMBER OF VOTING MEMBERS.—The
10 President shall, to the extent practicable, en-
11 sure that the voting membership of the commu-
12 nity advisory group does not exceed 20 individ-
13 uals.

14 “(D) COMPENSATION.—A member of a
15 community advisory group shall serve without
16 compensation.

17 “(E) NONVOTING MEMBERS.—The Presi-
18 dent shall ensure that representatives of the fol-
19 lowing entities participate as appropriate (as
20 nonvoting members) in community advisory
21 group meetings for purposes including providing
22 information and technical expertise:

23 “(i) The Administrator.

24 “(ii) Other Federal agencies.

25 “(iii) Affected States.

1 “(iv) Affected Indian tribes.

2 “(v) Representatives of affected local
3 governments (such as city or county gov-
4 ernments or local emergency planning com-
5 mittees, and any other governmental unit
6 that regulates land use or land use plan-
7 ning in the vicinity of the facility).

8 “(vii) Facility owners.

9 “(viii) Potentially responsible parties.

10 “(6) TECHNICAL ASSISTANCE GRANTS.—The
11 President may award a technical assistance grant
12 under subsection (i) to a community advisory group.

13 “(7) ADMINISTRATIVE SUPPORT.—The Presi-
14 dent, to the extent practicable, may provide adminis-
15 trative services and support services to the commu-
16 nity advisory group.

17 “(8) FEDERAL ADVISORY COMMITTEE ACT.—
18 The Federal Advisory Committee Act (5 U.S.C.
19 App.) shall not apply to a community advisory
20 group.

21 “(9) OTHER OR EXISTING LOCAL COMMUNITY
22 GROUPS.—If the President determines that a De-
23 partment of Defense restoration advisory board, De-
24 partment of Energy site specific advisory board, or
25 equivalent advisory group serves the same function

1 as a community advisory group, the board or equiva-
2 lent group may be designated to perform that func-
3 tion without compliance with paragraph (1), (2), or
4 (5).

5 “(i) TECHNICAL ASSISTANCE GRANTS.—

6 “(1) AUTHORITY.—

7 “(A) IN GENERAL.—The President may
8 make technical assistance grants available to
9 members of an affected community for a cov-
10 ered facility in accordance with this subsection.

11 “(B) ACCESSIBILITY OF APPLICATION
12 PROCESS.—To ensure that the application proc-
13 ess for a technical assistance grant is accessible
14 to all affected citizen groups, the President
15 shall periodically review the process and, based
16 on the review, implement appropriate changes
17 to improve access.

18 “(C) NOTICE OF AVAILABILITY OF
19 GRANTS.—The President shall solicit the assist-
20 ance of a waste site information office in notify-
21 ing the affected community of the availability of
22 a technical assistance grant for a covered facil-
23 ity as soon as practicable after the President
24 has begun a response action at the covered fa-
25 cility.

1 “(2) SPECIAL RULES.—

2 “(A) NO MATCHING CONTRIBUTION.—No
3 matching contribution shall be required for a
4 technical assistance grant.

5 “(B) ADVANCE PAYMENTS.—The Presi-
6 dent may disburse the grant to a recipient in
7 advance of the recipient’s making expenditures
8 to be covered by the grant. In the event that
9 the President advances funds, funds shall be
10 advanced in amounts that do not exceed the
11 greater of \$5,000 or 10 percent of the grant
12 amount.

13 “(3) LIMIT PER FACILITY.—

14 “(A) IN GENERAL.—The Administrator
15 may award not more than 1 technical assistance
16 grant at 1 time with respect to a single covered
17 facility.

18 “(B) EXTENSION.—The Administrator
19 may extend a project period established in a
20 grant to facilitate public participation at all
21 stages of a response action.

22 “(4) FUNDING AMOUNT.—

23 “(A) LIMIT.—Except as provided in sub-
24 paragraph (B), the amount of a technical as-

1 sistance grant may not exceed \$50,000 for a
2 single grant recipient.

3 “(B) WAIVER OF LIMIT.—The President
4 may waive the limit on the amount of a tech-
5 nical assistance grant under subparagraph (A)
6 if a waiver is necessary—

7 “(i) to carry out the purposes of this
8 Act; or

9 “(ii) to reflect—

10 “(I) the complexity of the re-
11 sponse action;

12 “(II) the nature and extent of
13 contamination at the facility;

14 “(III) the level of facility activity;

15 “(IV) projected total needs as re-
16 quested by the grant recipient;

17 “(V) the size and diversity of the
18 affected population; or

19 “(VI) the ability of the grant re-
20 cipient to identify and raise funds
21 from other non-Federal sources.

22 “(5) CONSIDERATIONS.—In determining how to
23 structure payment of the amount of a technical as-
24 sistance grant, whether to extend a grant project pe-
25 riod under subparagraph (3)(B), or whether to grant

1 a waiver under paragraph (4)(B), the Administrator
2 may consider factors such as the geographical size of
3 the facility and the distances between affected com-
4 munities.

5 “(6) USE OF TECHNICAL ASSISTANCE
6 GRANTS.—

7 “(A) IN GENERAL.—A technical assistance
8 grant recipient may use a grant—

9 “(i) to hire experts to assist the recip-
10 ient in interpreting information and pre-
11 senting the recipient’s views with regard to
12 a response action at the facility (including
13 any aspect of a response action identified
14 in subsection (h)(4)(A));

15 “(ii) to publish newsletters or other-
16 wise disseminate information to other
17 members of the local community; or

18 “(iii) to provide funding for training
19 for interested affected citizens to enable
20 the citizens to more effectively participate
21 in the response process.

22 “(B) LIMITATION ON USE FOR TRAIN-
23 ING.—A technical assistance grant recipient
24 may use not more than 10 percent of the
25 amount of a technical assistance grant, or

1 \$5,000, whichever is less, for training under
2 subparagraph (A)(iii).

3 “(7) GRANT GUIDELINES.—Not later than 180
4 days after the date of enactment of this paragraph,
5 the President shall ensure that any guidelines con-
6 cerning the management of technical assistance
7 grants by grant recipients conform with this sec-
8 tion.”.

9 **TITLE IV—SELECTION OF**
10 **REMEDIAL ACTIONS**

11 **SEC. 401. DEFINITIONS.**

12 Section 101 of the Comprehensive Environmental Re-
13 sponse, Compensation, and Liability Act of 1980 (42
14 U.S.C. 9601) (as amended by section 105(a)) is amended
15 by adding at the end the following:

16 “(41) **TECHNICALLY IMPRACTICABLE.**—The
17 term ‘technically impracticable’ means impracticable
18 due to engineering infeasibility or unreliability or in-
19 ordinate costs.

20 “(42) **BENEFICIAL USE.**—The term “beneficial
21 use” means the use of land on completion of a re-
22 sponse action in a manner that confers economic, so-
23 cial, environmental, conservation, or aesthetic
24 benefit.”.

1 **SEC. 402. SELECTION AND IMPLEMENTATION OF REMEDIAL**
2 **ACTIONS.**

3 Section 121 of the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of 1980 (42
5 U.S.C. 9621) is amended—

6 (1) by striking the section heading and sub-
7 sections (a) and (b) and inserting the following:

8 **“SEC. 121. SELECTION AND IMPLEMENTATION OF REME-**
9 **DIAL ACTIONS.**

10 **“(a) GENERAL RULES.—**

11 **“(1) SELECTION OF COST-EFFECTIVE REME-**
12 **DIAL ACTION THAT PROTECTS HUMAN HEALTH AND**
13 **THE ENVIRONMENT.—**

14 **“(A) IN GENERAL.—**The President shall
15 select a cost-effective remedial action that
16 achieves the mandate to protect human health
17 and the environment as stated in subparagraph
18 (B) and attains or complies with applicable
19 Federal and State laws in accordance with sub-
20 paragraph (C).

21 **“(B) ATTAINMENT OF MANDATE TO PRO-**
22 **TECT HUMAN HEALTH AND THE ENVIRON-**
23 **MENT.—**

24 **“(i) PROTECTION OF HUMAN**
25 **HEALTH.—**Notwithstanding any other pro-
26 vision of this Act, a remedial action shall

1 protect human health. A remedial action
2 shall be considered to protect human
3 health if, considering the expected expo-
4 sures associated with the current or rea-
5 sonably anticipated future use of the land
6 and water resources and on the basis of a
7 facility-specific risk evaluation in accord-
8 ance with section 131, the remedial
9 action—

10 “(I) achieves a residual risk from
11 exposure to nonthreshold carcinogenic
12 hazardous substances, pollutants, or
13 contaminants such that cumulative
14 lifetime additional cancer from expo-
15 sure to hazardous substances, pollut-
16 ants, or contaminants from releases at
17 the facility range from 10^{-4} to 10^{-6}
18 for the affected population;

19 “(II) achieves a residual risk
20 from exposure to threshold carcino-
21 genic and noncarcinogenic hazardous
22 substances, pollutants, or contami-
23 nants at the facility, that does not ex-
24 ceed a hazard index of 1; and

1 “(III) prevents or eliminates any
2 actual human ingestion of drinking
3 water containing any hazardous sub-
4 stance from the release at levels—

5 “(aa) in excess of the maxi-
6 mum contaminant level estab-
7 lished under the Safe Drinking
8 Water Act (42 U.S.C. 300f et
9 seq.); or

10 “(bb) if no such maximum
11 contaminant level has been estab-
12 lished for the hazardous sub-
13 stance, at levels that meet the
14 goals for protection of human
15 health under clause (i).

16 “(ii) PROTECTION OF THE ENVIRON-
17 MENT.—

18 “(I) IN GENERAL.—A remedial
19 action for a facility shall be considered
20 to be protective of the environment if,
21 considering the current or reasonably
22 anticipated use of any land and water
23 resources, the remedial action protects
24 plants and animals from significant

1 impacts resulting from releases of
2 hazardous substances at the facility.

3 “(II) PROTECTIVENESS DETER-
4 MINATION.—The determination under
5 subclause (I) of what is protective of
6 plants and animals shall not be based
7 on the impact to an individual plant
8 or animal in the absence of an impact
9 at the population, community, or eco-
10 system level, unless the plant or ani-
11 mal is listed as a threatened or endan-
12 gered species under the Endangered
13 Species Act of 1973 (16 U.S.C. 1531
14 et seq.).

15 “(C) COMPLIANCE WITH FEDERAL AND
16 STATE LAWS.—

17 “(i) APPLICABLE REQUIREMENTS.—

18 “(I) IN GENERAL.—Subject to
19 clause (iii), a remedial action shall re-
20 quire, at the completion of the reme-
21 dial action, a level or standard of con-
22 trol for each hazardous substance,
23 pollutant, and contaminant that at
24 least attains the substantive require-
25 ments of all promulgated standards,

1 requirements, criteria, and limitations,
2 under—

3 “(aa) each Federal environ-
4 mental law, that are legally appli-
5 cable to the conduct or operation
6 of the remedial action or to the
7 level of cleanup for hazardous
8 substances, pollutants, or con-
9 taminants addressed by the re-
10 medial action;

11 “(bb) any State environ-
12 mental or facility siting law, that
13 are more stringent than any Fed-
14 eral standard, requirement, cri-
15 terion, or limitation and are le-
16 gally applicable to the conduct or
17 operation of the remedial action
18 or to the level of cleanup for haz-
19 ardous substances, pollutants, or
20 contaminants addressed by the
21 remedial action, and that the
22 State demonstrates are of general
23 applicability, publishes and iden-
24 tifies to the President in a timely
25 manner as being applicable to the

1 remedial action, and has consist-
2 ently applied to other remedial
3 actions in the State; and

4 “(cc) any more stringent
5 standard, requirement, criterion,
6 or limitation relating to an envi-
7 ronmental or facility siting law
8 promulgated by the State after
9 the date of enactment of the
10 Superfund Cleanup Acceleration
11 Act of 1997 that the State dem-
12 onstrates are of general applica-
13 bility, publishes and identifies to
14 the President in a timely manner
15 as being applicable to the reme-
16 dial action, and has consistently
17 applied to other remedial actions
18 in the State.

19 “(II) CONTAMINATED MEDIA.—
20 Compliance with substantive provi-
21 sions of section 3004 of the Solid
22 Waste Disposal Act (42 U.S.C. 6924)
23 shall not be required with respect to
24 return, replacement, or disposal of
25 contaminated media (including residu-

1 als of contaminated media and other
2 solid wastes generated onsite in the
3 conduct of a remedial action) into the
4 same media in or very near then-exist-
5 ing areas of contamination onsite at a
6 facility.

7 “(ii) APPLICABILITY OF REQUIRE-
8 MENTS TO RESPONSE ACTIONS CON-
9 DUCTED ONSITE.—No procedural or ad-
10 ministrative requirement of any Federal,
11 State, or local law (including any require-
12 ment for a permit) shall apply to a re-
13 sponse action that is conducted onsite at a
14 facility if the response action is selected
15 and carried out in compliance with this
16 section.

17 “(iii) WAIVER PROVISIONS.—

18 “(I) IN GENERAL.—The Presi-
19 dent may select a remedial action at a
20 facility that meets the requirements of
21 subparagraph (B) that does not attain
22 a level or standard of control that is
23 at least equivalent to an applicable re-
24 quirement described in clause (i)(I) if

1 the President makes any of the follow-
2 ing findings:

3 “(aa) PART OF REMEDIAL
4 ACTION.—The selected remedial
5 action is only part of a total re-
6 medial action that will attain the
7 applicable requirements of clause
8 (i)(I) when the total remedial ac-
9 tion is completed.

10 “(bb) GREATER RISK.—At-
11 tainment of the requirements of
12 clause (i)(I) will result in greater
13 risk to human health or the envi-
14 ronment than alternative options.

15 “(cc) TECHNICAL IMPRAC-
16 TICABILITY.—Attainment of the
17 requirements of clause (i)(I) is
18 technically impracticable.

19 “(dd) EQUIVALENT TO
20 STANDARD OF PERFORMANCE.—
21 The selected remedial action will
22 attain a standard of performance
23 that is equivalent to that re-
24 quired under clause (i)(I)

1 through use of another method
2 or approach.

3 “(ee) INCONSISTENT APPLI-
4 CATION.—With respect to a State
5 requirement made applicable
6 under clause (i)(I), the State has
7 not consistently applied (or dem-
8 onstrated the intention to apply
9 consistently) the requirement in
10 similar circumstances to other re-
11 medial actions in the State.

12 “(ff) BALANCE.—In the case
13 of a remedial action to be funded
14 predominantly under section 104
15 or 136 using amounts from the
16 Fund, a selection of a remedial
17 action that attains that level or
18 standard of control described in
19 clause (i)(I) will not provide a
20 balance between the need for pro-
21 tection of public health and wel-
22 fare and the environment at the
23 facility, and the need to make
24 amounts from the Fund available
25 to respond to other facilities that

1 may present a threat to public
2 health or welfare or the environ-
3 ment, taking into consideration
4 the relative immediacy of the
5 threats presented by the various
6 facilities.

7 “(II) PUBLICATION.—The Presi-
8 dent shall publish any findings made
9 under subclause (I), including an ex-
10 planation and appropriate documenta-
11 tion and an explanation of how the se-
12 lected remedial action meets the re-
13 quirements of section 121.

14 “(D) NO STANDARD.—If no applicable
15 Federal or State standard has been established
16 for a specific hazardous substance, pollutant, or
17 contaminant, a remedial action shall attain a
18 standard that the President determines to be
19 protective of human health and the environment
20 as stated in subsection (a)(1)(B).

21 “(2) METHODOLOGY FOR SELECTION OF A RE-
22 MEDIAL ACTION.—

23 “(A) IN GENERAL.—The President shall
24 select a remedial action from among a range of
25 alternative remedial actions that satisfy the re-

1 quirements of paragraph (1) by balancing the
2 criteria stated in paragraph (3). The Presi-
3 dent's selection of a remedial action under this
4 section shall take into account the remedy selec-
5 tion rules stated in subsection (b).

6 “(B) PRESUMPTIVE REMEDIAL ACTIONS.—
7 A remedial action that implements a presump-
8 tive remedial action issued under section 132
9 shall be considered to achieve the goals stated
10 in paragraph (1), balance adequately the fac-
11 tors stated in paragraph (3) and account for
12 the rules states in subsection (b).

13 “(3) REMEDY SELECTION CRITERIA.—In select-
14 ing a remedial action from among alternatives that
15 satisfy the requirements of subsection (a)(1) and
16 take into account the rules stated in subsection (b),
17 the President shall balance the following factors, en-
18 suring that no single factor predominates over the
19 others:

20 “(A) The effectiveness of the remedy in
21 protecting human health and the environment.

22 “(B) The reliability of the remedial action
23 in achieving the protectiveness standards over
24 the long term.

1 “(C) Any short-term risk to the affected
2 community, those engaged in the remedial ac-
3 tion effort, and to the environment posed by the
4 implementation of the remedial action.

5 “(D) The acceptability of the remedial ac-
6 tion to the affected community.

7 “(E) The implementability of the remedial
8 action.

9 “(F) The reasonableness of the cost.

10 “(b) REMEDY SELECTION RULES.—

11 “(1) REASONABLY ANTICIPATED FUTURE USE
12 OF LAND AND WATER RESOURCES.—

13 “(A) IN GENERAL.—In selecting a remedy
14 for a facility, the President shall take into ac-
15 count the reasonably anticipated future use of
16 land and water resources potentially affected by
17 the release or threat of release of a hazardous
18 substance, pollutant, or contaminant from the
19 facility.

20 “(B) USE OF LAND RESOURCES.—

21 “(i) CONSIDERATION OF VIEWS.—In
22 developing assumptions regarding reason-
23 ably anticipated future land uses to be
24 used in developing and evaluating remedial

1 alternatives, the President shall consider
2 the views of—

3 “(I) local government officials;
4 and

5 “(II) members of the affected
6 community, particularly persons who
7 are immediately proximate to or may
8 be directly affected by the release or
9 threatened release of a hazardous sub-
10 stance, pollutant, or contaminant
11 from the facility.

12 “(ii) FACTORS TO BE CONSIDERED.—
13 In developing assumptions regarding rea-
14 sonably anticipated future land use to be
15 used in developing and evaluating remedial
16 alternatives, the President shall consider,
17 in addition to views of persons described in
18 clause (i), factors including the following:

19 “(I) The current land use zoning
20 and future land use plans of the local
21 government with land use regulatory
22 authority.

23 “(II)(aa) The recent land use
24 history of the facility and properties
25 in the vicinity of the facility.

1 “(bb) The current land uses of
2 the facility and properties in the vicin-
3 ity of the facility.

4 “(cc) Recent development pat-
5 terns in the area where the facility is
6 located.

7 “(dd) Population projections for
8 the area where the facility is located.

9 “(III) Federal and State land use
10 designations, including—

11 “(aa) Federal facility and
12 national park designations;

13 “(bb) State ground water or
14 surface water recharge area des-
15 ignations established under a
16 State’s comprehensive protection
17 plan for ground water or surface
18 water; and

19 “(cc) recreational and con-
20 servation area designations.

21 “(IV) The potential for beneficial
22 use.

23 “(V) The proximity of the con-
24 tamination to residences, natural re-

1 sources, or areas of unique historic or
2 cultural significance.

3 “(VI) The plans of the owner or
4 operator of the facility.

5 “(c) USE OF WATER RESOURCES.—In developing as-
6 sumptions regarding what future ground water and sur-
7 face water uses may be reasonably anticipated, the Presi-
8 dent shall—

9 “(1) consider and accord substantial deference
10 to the classifications and designations set forth in a
11 State comprehensive ground water protection pro-
12 gram that has been endorsed by the Administrator;
13 and

14 “(2) consider other designations or plans adopt-
15 ed by the governmental unit that regulates surface
16 or ground water use planning in the vicinity of the
17 facility, including a State’s designation of uses under
18 the underground injection control program or a
19 State classification guideline.

20 “(D) ADMINISTRATIVE RECORDS.—All in-
21 formation on which the President bases the de-
22 velopment of assumptions under this para-
23 graphs shall be included in the administrative
24 record established under section 113(k).

25 “(2) GROUND WATER.—

1 “(A) IN GENERAL.—

2 “(i) SELECTION OF REMEDIAL AC-
3 TION.—The President shall select a reme-
4 dial action for contaminated ground water
5 in accordance with subsection (a), as modi-
6 fied by the requirements of this paragraph.

7 “(ii) PHASING.—The use of phasing
8 shall be considered in a remedial action for
9 ground water in order to allow collection of
10 sufficient data to evaluate the effect of any
11 other remedial action taken at the site and
12 to determine the appropriate scope of the
13 remedial action.

14 “(iii) FACTORS TO BE TAKEN INTO
15 ACCOUNT.—A decision regarding a reme-
16 dial action for contaminated ground water
17 shall take into account—

18 “(I) the current or reasonably
19 anticipated future use of the ground
20 water and the timing of that use;

21 “(II) any attenuation or biodeg-
22 radation that would occur if no reme-
23 dial action were taken; and

24 “(III) the effect of any other
25 completed or planned response action.

100

1 “(B) UNCONTAMINATED GROUND
2 WATER.—Subject to subparagraph (E), a reme-
3 dial action shall seek to protect uncontaminated
4 ground water that is suitable for use as drink-
5 ing water for such beneficial use unless it is
6 technically impracticable to do so.

7 “(C) CONTAMINATED GROUND WATER.—

8 “(i) IN GENERAL.—In the case of con-
9 taminated ground water for which the cur-
10 rent or reasonably anticipated future use
11 of the resource is as drinking water, unless
12 the President determines that restoration
13 of some portion of the contaminated
14 ground water to a condition suitable for
15 the use is technically impracticable, the
16 President shall seek to restore the ground
17 water to a condition suitable for beneficial
18 use.

19 “(ii) EVALUATION OF TECHNICAL
20 PRACTICABILITY.—In evaluating the tech-
21 nical practicability of restoration and the
22 time frame in which restoration can be
23 achieved, the President may distinguish
24 among 2 or more zones of ground water
25 contamination at a facility and may select

1 a remedial action that includes different
2 actions, points of compliance, and time
3 frames tailored to the circumstances of
4 each such zone.

5 “(iii) INTEGRATION OF ACTIONS.—Ac-
6 tions taken in any zone shall be integrated
7 with actions taken, points of compliance,
8 and time frames selected in other zones.

9 “(iv) REMEDIAL ACTION STAND-
10 ARDS.—A remedial action for contami-
11 nated ground water the current or reason-
12 ably anticipated future use of which is
13 drinking water shall, unless technically im-
14 practicable, attain in the contaminated
15 ground water plume, extending to the edge
16 of any hazardous substance, pollutant, or
17 contaminant that will be managed in place
18 as part of the remedial action, 1 of the fol-
19 lowing standards:

20 “(I) Maximum contaminant lev-
21 els established under the Safe Drink-
22 ing Water Act (42 U.S.C. 300f et
23 seq.), unless a standard under sub-
24 clause (II) would be more stringent.

1 “(II) State drinking water stand-
2 ards or State water quality standards
3 for water designated for drinking
4 water use.

5 “(III) If no standard under sub-
6 clause (I) or (II) is applicable, a level
7 selected in accordance with subsection
8 (a)(1)(D) and section 131 that is pro-
9 tective of human health and the
10 environment.

11 “(v) CONTAMINANTS MANAGED IN
12 PLACE.—Restoration to beneficial use and
13 the standards under clause (iv) are not re-
14 quired to be attained in an area in which
15 any hazardous substance, pollutant, or
16 contaminant is managed in place.

17 “(vi) NOT A POTENTIAL SOURCE OF
18 DRINKING WATER.—In the case of con-
19 taminated ground water or surface water
20 that is not suitable for beneficial use as
21 drinking water (as determined under sub-
22 paragraph (F)), a remedial action shall,
23 unless it is technically impracticable for it
24 to do so, attain a standard that is protec-
25 tive for the current or reasonably antici-

1 pated future uses of the water and any
2 surface water to which the contaminated
3 water discharges.

4 “(vii) RESTORATION TECHNICALLY
5 IMPRACTICABLE.—

6 “(I) IN GENERAL.—A remedial
7 action for contaminated ground water
8 having current or reasonably antici-
9 pated future use as a drinking water
10 source for which attainment of the
11 levels described in clause (iv) is tech-
12 nically impracticable shall be selected
13 in accordance with this clause.

14 “(II) NO INGESTION.—A reme-
15 dial action shall include, as appro-
16 priate, provision of an alternate water
17 supply, point-of-entry, or point-of-use
18 treatment or other measures to ensure
19 that there will be no ingestion of or
20 exposure of humans to drinking water
21 at levels exceeding the requirements of
22 subparagraph (C)(iv).

23 “(III) PREVENTION OF IMPAIR-
24 MENT OF DESIGNATED SURFACE
25 WATER USE.—A remedial action shall,

1 unless it is technically impracticable
2 for it to do so, prevent impairment of
3 any designated surface water use es-
4 tablished under section 303 of the
5 Federal Water Pollution Control Act
6 (42 U.S.C. 1313) or comparable State
7 law caused by a hazardous substance,
8 pollutant, or contaminant in any sur-
9 face water into which contaminated
10 ground water is known or expected to
11 enter.

12 “(IV) PROVISION FOR LONG-
13 TERM MONITORING.—A remedial ac-
14 tion shall provide for long-term mon-
15 itoring, as appropriate (including any
16 information needed for the purposes
17 of review under subsection (c)).

18 “(V) RESPONSIBILITY OF PAR-
19 TIES.—If the President selects point-
20 of-entry or point-of-use treatment, an
21 alternative source of water supply, or
22 another method of treating contami-
23 nated water (including treatment be-
24 fore distribution), the party or parties
25 otherwise responsible for remediation

1 shall be responsible for providing
2 drinking water meeting the require-
3 ments of clause (iv), including all di-
4 rectly associated incremental costs for
5 operation and maintenance and for
6 delivery of drinking water for current
7 and reasonably anticipated future uses
8 until such time as the level of con-
9 tamination is reliably and consistently
10 at or below the levels specified under
11 clause (iv).

12 “(D) MONITORED NATURAL ATTENU-
13 ATION.—

14 “(i) IN GENERAL.—Monitored natural
15 attenuation may be used as an element of
16 a remedial action for contaminated ground
17 water.

18 “(ii) FACTORS TO BE TAKEN INTO AC-
19 COUNT.—In using monitored natural at-
20 tenuation as part of a ground water action,
21 the President or preparer of the remedial
22 action plan shall take into account the fac-
23 tors listed in subparagraph (A) (iii).

24 “(E) ALTERNATE CONCENTRATION LIMITS
25 FOR CONTAMINATED GROUND WATER.—For the

1 purposes of this section, a process for establish-
2 ing alternate concentration limits to those oth-
3 erwise applicable for hazardous substances, pol-
4 lutants, or contaminants under subparagraph
5 (C)(iv) may not be used to establish standards
6 under this paragraph if the process assumes a
7 point of human exposure beyond the boundary
8 of the facility, as defined at the conclusion of
9 the remedial investigation and feasibility study,
10 except that where—

11 “(i) there are known and projected
12 points of entry of ground water into sur-
13 face water; and

14 “(ii) on the basis of measurements of
15 projections, there is and will be no impair-
16 ment of the designated use established
17 under section 303 of the Federal Water
18 Pollution Control Act (42 U.S.C. 1313)
19 from ground water in such surface water
20 at the point of entry or at any point where
21 there is reason to believe accumulation of
22 constituents may occur downstream; and

23 “(iii) the remedial action includes en-
24 forceable measures that will preclude
25 human exposure to the contaminated

1 ground water at any point between the fa-
2 cility boundary and all known and pro-
3 jected points of entry of such ground water
4 into surface water;

5 the assumed point of human exposure may be
6 at such known and projected points of entry.

7 “(F) GROUND WATER NOT SUITABLE FOR
8 BENEFICIAL USE AS DRINKING WATER.—Not-
9 withstanding any other evaluation or determina-
10 tion regarding the suitability of ground water
11 for drinking water use, ground water that is not
12 suitable for use as drinking water because of—

13 “(i) naturally occurring conditions;

14 “(ii) contamination resulting from
15 broad-scale human activity unrelated to a
16 specific facility or release that restoration
17 of drinking water quality is technically im-
18 practicable; or

19 “(iii) physical incapability of yielding
20 a quantity of 150 gallons per day of water
21 to a well or spring (unless the well or
22 spring is currently being used as a source
23 of drinking water);

24 shall not be considered as suitable for beneficial
25 use as drinking water.

1 “(3) PREFERENCE FOR TREATMENT.—

2 “(A) IN GENERAL.—For any discrete area
3 containing a hazardous substance, pollutant, or
4 contaminant that—

5 “(i) cannot be reliably contained; and

6 “(ii) presents a substantial risk to
7 human health and the environment be-
8 cause of—

9 “(I) the high toxicity of the haz-
10 ardous substance, pollutant, or con-
11 taminant;

12 “(II) the high mobility of the
13 hazardous substance, pollutant, or
14 contaminant; and

15 “(III) a reasonable probability of
16 actual exposure based upon an evalua-
17 tion of site-specific factors;

18 the remedy selection process described in sub-
19 section (a) shall include a preference for a re-
20 medial action that includes treatment that re-
21 duces the risk posed by the nature and prob-
22 ability of exposure to the hazardous substance,
23 pollutant, or contaminant over remedial actions
24 that do not include such treatment.

1 “(B) FINAL CONTAINMENT.—With respect
2 to a discrete area described in subparagraph
3 (A), the President may select a final contain-
4 ment remedy at a landfill or mining site or
5 similar facility if—

6 “(i)(I) the discrete area is small rel-
7 ative to the overall volume of waste or con-
8 tamination being addressed;

9 “(II) the discrete area is not readily
10 identifiable and accessible; and

11 “(III) without the presence of the dis-
12 crete area, containment would have been
13 selected as the appropriate remedy under
14 this subsection for the larger body of waste
15 or larger area of contamination in which
16 the discrete area is located; or

17 “(ii) the volume and size of the dis-
18 crete area is extraordinary compared to
19 other facilities listed on the National Prior-
20 ities List, and, because of the volume, size,
21 and other characteristics of the discrete
22 area, it is highly unlikely that any treat-
23 ment technology will be developed that
24 could be implemented at a reasonable cost.

1 “(4) INSTITUTIONAL AND ENGINEERING CON-
2 TROLS.—

3 “(A) DEFINITION OF INSTITUTIONAL CON-
4 TROL.—In this paragraph, the term ‘institu-
5 tional control’ means a restriction on the per-
6 missible use of land, ground water, or surface
7 water, included as part of the basis of decision
8 in a final record of decision or any other en-
9 forceable decision document for a facility on the
10 National Priorities List, to comply with the re-
11 quirements of section 121(a) to protect human
12 health and the environment, including—

13 “(i) a zoning restriction or future land
14 use plan of the local government with land
15 use regulatory authority;

16 “(ii) a contaminated ground water
17 management zone or permit program of
18 the government unit that regulates ground
19 water;

20 “(iii) site acquisition under paragraph
21 (1) or (2) of section 104(j) by the Admin-
22 istrator or the State to control access to
23 the facility;

1 “(iv) an easement or deed restriction
2 precluding or limiting specific uses of the
3 facility; and

4 “(v) a notice, advisory, or alert to
5 warn of a public health threat from con-
6 taminated ground water or from eating
7 fish from contaminated surface water.

8 “(B) USES.—The Administrator may not
9 select a remedial action that allows a hazardous
10 substance, pollutant, or contaminant to remain
11 at a facility above a level that would be protec-
12 tive for unrestricted use unless institutional and
13 engineering controls are incorporated into the
14 remedial action to ensure protection of human
15 health and the environment during and after
16 completion of the remedial action.

17 “(C) REQUIREMENTS FOR INSTITUTIONAL
18 CONTROLS.—In a case in which the Adminis-
19 trator selects a response action that relies in
20 whole or in part on restrictions on land use or
21 other resources or activities, the Administrator
22 shall require institutional controls that—

23 “(i) are adequate to protect human
24 health and the environment;

1 “(ii) ensure the long-term reliability of
2 the response action; and

3 “(iii) will be appropriately imple-
4 mented, monitored, and enforced.

5 “(D) RECORD OF DECISION.—Each record
6 of decision with respect to a facility shall clearly
7 identify any institutional controls that restrict
8 uses of land or other resources or activities at
9 the facility.

10 “(E) OTHER CONSIDERATIONS.—A reme-
11 dial action that uses institutional and engineer-
12 ing controls shall be considered under this Act
13 to be on an equal basis with all other remedial
14 action alternatives.

15 “(F) REGISTRY.—The Administrator shall
16 maintain a registry of institutional controls
17 that—

18 “(i) place restrictions on the use of
19 land, water, or other resources; and

20 “(ii) are included as part of the basis
21 of decision in a final record of decision or
22 any other enforceable decision document
23 with respect to a facility on the National
24 Priorities List.

25 (5) TECHNICAL IMPRACTICABILITY.—

1 “(A) MINIMIZATION OF RISK.—If the
2 President, after reviewing the remedy selection
3 methodology stated in subsection (a)(2), finds
4 that complying with or attaining a standard re-
5 quired by subparagraph (C) or (D) of sub-
6 section (a)(1), or, if applicable, by a rule stated
7 in subsection (b), is technically impracticable,
8 the President shall evaluate remedial measures
9 and select a technically practicable remedial ac-
10 tion that—

11 “(i) protects human health (within the
12 meaning of subsection (a)(1)(B)); and

13 “(ii) will most closely achieve the
14 goals stated in paragraph (1) through cost-
15 effective means.

16 “(B) BASIS FOR FINDING.—A finding of
17 technical impracticability may be made on the
18 basis of projections, modeling, or other analysis
19 on a site-specific basis.

20 “(C) PROMPT DETERMINATION.—The
21 President shall make a determination of tech-
22 nical impracticability as soon as the President
23 determines that sufficient information is avail-
24 able to make the determination.

25 “(D) PROCESS.—

1 “(i) DETERMINATION OF NECESSITY
2 OF COMPLIANCE WITH STANDARD OR RE-
3 QUIREMENT.—The President shall evaluate
4 and determine if it is not appropriate for
5 a remedial action to attain or comply with
6 a required standard under subparagraphs
7 (C) and (D) of subsection (a)(1), or, where
8 applicable, with a requirement stated in a
9 rule in subsection (b).

10 “(ii) WAIVER ON THE BASIS OF TECH-
11 NICAL IMPRACTICABILITY.—A finding that
12 it is technically impracticable to attain or
13 comply with an applicable Federal or State
14 law under subsection (a)(1)(C)(i)(I) shall
15 constitute a waiver under subsection
16 (a)(1)(C)(iii).

17 “(iii) INITIATION OF REVIEW.—The
18 President may initiate a review to deter-
19 mine whether a finding of technical im-
20 practicability is appropriate on the Admin-
21 istrator’s own initiative or on the request
22 of a person that is conducting a remedial
23 action, if the request is supported by ap-
24 propriate documentation.

1 “(E) NOTICE OF FINDING.—If the Presi-
2 dent makes a finding of technical impracticabil-
3 ity, the President shall publish the finding, ac-
4 companyed by—

5 “(i) an explanation of the finding,
6 with appropriate justification; and

7 “(ii) an explanation of how the se-
8 lected remedial action meets the require-
9 ments of subsection (a)(1)(B).”;

10 (2) by striking subsection (d); and

11 (3) by redesignating subsections (e) and (f) as
12 subsections (c) and (d), respectively.

13 **SEC. 403. REMEDY SELECTION METHODOLOGY.**

14 Title I of the Comprehensive Environmental Re-
15 sponse, Compensation, and Liability Act of 1980 (42
16 U.S.C. 9601 et seq.) (as amended by section 201(a)) is
17 amended by adding at the end the following:

18 **“SEC. 131. FACILITY-SPECIFIC RISK EVALUATIONS.**

19 “(a) IN GENERAL.—The goal of a facility-specific
20 risk evaluation performed under this Act is to provide in-
21 formative and understandable estimates that neither mini-
22 mize nor exaggerate the current or potential risk posed
23 by a facility.

24 “(b) RISK EVALUATION PRINCIPLES.—

1 “(1) IN GENERAL.—A facility-specific risk eval-
2 uation shall—

3 “(A)(i) use chemical-specific and facility-
4 specific data in preference to default assump-
5 tions whenever it is practicable to obtain such
6 data; or

7 “(ii) if it is not practicable to obtain such
8 data, use a range and distribution of realistic
9 and scientifically supportable default assump-
10 tions;

11 “(B) ensure that the exposed population
12 and all current and potential pathways and pat-
13 terns of exposure are accurately evaluated;

14 “(C) consider the current or reasonably
15 anticipated future use of the land and water re-
16 sources in estimating exposure; and

17 “(D) consider the use of institutional con-
18 trols that comply with the requirements stated
19 in section 121(b)(4).

20 “(2) CRITERIA FOR USE OF SCIENCE.—Any
21 chemical-specific and facility-specific data or default
22 assumptions used in connection with a facility-spe-
23 cific risk evaluation shall be consistent with the cri-
24 teria for the use of science in decisionmaking stated
25 in subsection (e).

1 “(3) INSTITUTIONAL CONTROLS.— In conduct-
2 ing a risk assessment to determine the need for re-
3 medial action, the President may consider only insti-
4 tutional controls that are in place at the facility at
5 the time at which the risk assessment is conducted.

6 “(c) USES.—A facility-specific risk evaluation shall
7 be used to—

8 “(1) determine the need for remedial action;

9 “(2) evaluate the current and potential hazards,
10 exposures, and risks at the facility;

11 “(3) screen out potential contaminants, areas,
12 or exposure pathways from further study at a
13 facility;

14 “(4) evaluate the protectiveness of alternative
15 remedial actions proposed for a facility;

16 “(5) demonstrate that the remedial action se-
17 lected for a facility is capable of protecting human
18 health and the environment considering the current
19 and reasonably anticipated future use of the land
20 and water resources; and

21 “(6) establish protective concentration levels if
22 no applicable requirement under section
23 121(a)(1)(C) exists or if an otherwise applicable re-
24 quirement is not sufficiently protective of human

1 health and the environment under section
2 121(a)(1)(B).

3 “(d) RISK COMMUNICATION PRINCIPLES.—In carry-
4 ing out this section, the President shall ensure that the
5 presentation of information on public health effects is
6 comprehensive, informative, and understandable. The doc-
7 ument reporting the results of a facility-specific risk eval-
8 uation shall specify, to the extent practicable—

9 “(1) each population addressed by any estimate
10 of public health effects;

11 “(2) the expected risk or central estimate of
12 risk for the specific populations;

13 “(3) each appropriate upper-bound or lower-
14 bound estimate of risk;

15 “(4) each uncertainty identified in the process
16 of the assessment of public health effects and re-
17 search that would assist in resolving the uncertainty;
18 and

19 “(5) peer-reviewed studies known to the Presi-
20 dent that support, are directly relevant to, or fail to
21 support any estimate of public health effects and the
22 methodology used to reconcile inconsistencies in the
23 scientific data.

24 “(e) USE OF SCIENCE IN DECISIONMAKING.—In car-
25 rying out this section, the President shall use—

1 “(1) the best available peer-reviewed science
2 and supporting studies conducted in accordance with
3 sound and objective scientific practices; and

4 “(2) data collected by accepted methods or best
5 available methods (if the reliability of the method
6 and the nature of the decision justifies use of the
7 data).

8 “(f) REGULATIONS.—Not later than 18 months after
9 the date of enactment of this section, the President shall
10 issue a final regulation implementing this section.

11 **“SEC. 132. PRESUMPTIVE REMEDIAL ACTIONS.**

12 “(a) IN GENERAL.—In order to streamline the reme-
13 dial action selection process, the Administrator shall es-
14 tablish presumptive remedial actions that—

15 “(1) identify preferred technologies and ap-
16 proaches (which may include as an element institu-
17 tional and engineering controls, if appropriate) for
18 common categories of facilities; and

19 “(2) identify, as appropriate, site categorization
20 methodologies for those categories of facilities.

21 **“(b) PRESUMPTIVE REMEDIAL ACTIONS.—**

22 “(1) IN GENERAL.—The Administrator shall es-
23 tablish presumptive remedial actions that are prac-
24 ticable, cost-effective, and demonstrated methods to

1 protect human health and the environment under
2 this Act.

3 “(2) MATTERS TO BE TAKEN INTO ACCOUNT.—
4 In establishing a presumptive remedial action, the
5 Administrator shall take into account the goals stat-
6 ed in section 121(a)(1), the factors stated in section
7 121(a)(3), and the rules stated in section 121(b).

8 “(3) PROCEDURE; JUDICIAL REVIEW.—The
9 identification of categories of facilities and site cat-
10 egorization methodologies and the establishment of
11 presumptive remedial actions under this section shall
12 not be subject to—

13 “(A) the rulemaking procedure of section
14 553 of title 5, United States Code; or

15 “(B) judicial review.

16 “(c) USE OF PRESUMPTIVE REMEDIAL ACTIONS.—In
17 appropriate circumstances, the Administrator may select
18 a presumptive remedial action—

19 “(1) from among technologies and approaches
20 identified under subsection (a)(1); or

21 “(2) based on only the site characterization
22 methodologies identified under subsection (a)(2),
23 without consideration of technologies, approaches, or
24 methodologies that have not been identified for that

1 category of facility in the list prepared under sub-
2 section (d).

3 “(d) NOTICE AND PERIODIC REVIEW.—

4 “(1) INITIAL LIST.—Not later than 1 year after
5 the date of enactment of this section, the Adminis-
6 trator shall make available to the public a list of pre-
7 sumptive remedial actions identified under sub-
8 section (a) that are available for specific categories
9 of facilities, and solicit information to assist the Ad-
10 ministrator in modifying or adding to the list, as ap-
11 propriate.

12 “(2) UPDATED LISTS.—At least once every 3
13 years, the Administrator shall solicit information
14 from the public for the purpose of updating pre-
15 sumptive remedial actions, as appropriate, to incor-
16 porate emerging technologies, approaches, or meth-
17 odologies or designate additional categories of
18 facilities.”.

19 **SEC. 404. REMEDY SELECTION PROCEDURES.**

20 Title I of the Comprehensive Environmental Re-
21 sponse, Compensation, and Liability Act of 1980 (42
22 U.S.C. 9601 et seq.) (as amended by section 403) is
23 amended by adding at the end the following:

1 **"SEC. 133. AMENDMENTS TO THE NATIONAL CONTINGENCY**
2 **PLAN.**

3 “(a) IN GENERAL.—In order to reflect the amend-
4 ments made by the Superfund Cleanup Acceleration Act
5 of 1997 (including subsections (b) and (c) of section 134
6 and section 132), not later than 180 days after the date
7 of enactment of this section, the President shall—

8 “(1) revise the National Contingency Plan; and

9 “(2) as appropriate, issue and periodically up-
10 date Agency guidance.

11 **"SEC. 134. REMEDIAL ACTION PLANNING AND IMPLEMEN-**
12 **TATION.**

13 “(a) ACCELERATED RESPONSE GENERALLY.—

14 “(1) IN GENERAL.—To the extent practicable,
15 and consistent with requirements in section 121, the
16 President shall seek to expedite implementation of
17 response actions and reduce transaction costs by im-
18 plementing measures to—

19 “(A) accelerate and increase the efficiency
20 of the remedy selection and implementation
21 processes;

22 “(B) tailor the level of oversight of per-
23 formance of a response action by a potentially
24 responsible party or group of potentially respon-
25 sible parties considering the circumstances of
26 the response action; and

1 “(C) streamline the processes for submit-
2 tal, review, and approval of plans and other
3 documents.

4 “(b) ACCELERATION OF INVESTIGATIVE ACTIVITIES
5 AND RESPONSE ACTIONS.—

6 “(1) PHASING OF INVESTIGATIVE AND RE-
7 SPONSE ACTIVITIES.—The President shall seek to
8 expedite protection of human health and the envi-
9 ronment and completion of response actions in an
10 efficient and cost-effective manner through appro-
11 priate phasing and integration of investigative and
12 response activities.

13 “(2) USE OF RESULTS OF INITIAL INVESTIGA-
14 TIONS.—The results of initial investigations of a fa-
15 cility shall be used, as appropriate—

16 “(A) to focus subsequent data collection ef-
17 forts in order to characterize the nature and ex-
18 tent of contamination at the facility in an effi-
19 cient and cost-effective manner; or

20 “(B) to develop and support multiple
21 phases of a response action, as appropriate.

22 “(3) EARLY RESPONSE ACTIONS.—

23 “(A) IMPLEMENTATION.—An early re-
24 sponse action under section 104 or 106 shall be
25 implemented, to the extent practicable, to—

1 “(i) prevent exposure to hazardous
2 substances, pollutants, and contaminants;
3 and

4 “(ii) prevent further migration of haz-
5 ardous substances, pollutants, or contami-
6 nants.

7 “(B) USE OF RESULTS.—The results of an
8 early response action shall be used to—

9 “(i) further characterize the nature
10 and extent of contamination at the facility;
11 and

12 “(ii) provide information needed to
13 evaluate and select any additional appro-
14 priate response actions that are needed to
15 protect human health and the environment.

16 “(C) COMPLIANCE WITH REQUIRE-
17 MENTS.—An early response action shall—

18 “(i) meet the requirements of this Act
19 (including the requirements for public par-
20 ticipation) and

21 “(ii) to the extent practicable, contrib-
22 ute to the efficient performance of any
23 long-term remedial action with respect to
24 the release or threatened release
25 concerned.

1 “(c) PARTICIPATION IN THE RESPONSE ACTION
2 PROCESS BY POTENTIALLY RESPONSIBLE PARTIES.—

3 “(1) REQUIREMENTS.—When the President de-
4 termines under paragraph (5) that a response action
5 will be performed properly and promptly by a poten-
6 tially responsible party or group of potentially re-
7 sponsible parties in accordance with the require-
8 ments of this Act, the President may allow the po-
9 tentially responsible party or group of potentially re-
10 sponsible parties to perform the response action in
11 accordance with this section, section 106, or section
12 122.

13 “(2) PERFORMANCE OF RESPONSE ACTION.—
14 The President may authorize performance of a re-
15 sponse action by a potentially responsible party or
16 group of potentially responsible parties only if—

17 “(A) the President determines that the po-
18 tentially responsible party or group of poten-
19 tially responsible parties is qualified to perform
20 the response action; and

21 “(B) the potentially responsible party or
22 group of potentially responsible parties agrees
23 to reimburse the Fund for any cost incurred by
24 the President in overseeing and reviewing the
25 performance of the response action by the po-

1 tentially responsible party or group of poten-
2 tially responsible parties, including the costs of
3 contracting or arranging for a qualified person
4 to assist the President in conducting the over-
5 sight and review.

6 “(3) OVERSIGHT OF RESPONSE ACTIONS.—The
7 President may tailor the level of oversight that will
8 accompany performance of a response action by the
9 potentially responsible party or group of potentially
10 responsible parties based on factors including the
11 factors set forth in paragraph (5).

12 “(4) RESPONSE ACTION ACTIVITIES.—The
13 President may authorize a potentially responsible
14 party or group of potentially responsible parties to
15 perform removal and remedial actions, including—

16 “(A) remedial investigations (including risk
17 assessments);

18 “(B) feasibility studies;

19 “(C) preparation of draft proposed reme-
20 dial action plans;

21 “(D) remedial designs;

22 “(E) operation and maintenance;

23 “(F) maintenance of institutional controls;

1 “(G) studies that the President determines
2 are necessary for the President to conduct re-
3 view under section 135(c)(2); and

4 “(H) any response action that the Presi-
5 dent determines is required as a result of the
6 review under of section 135(c)(2).

7 “(5) OVERSIGHT FACTORS.—In determining for
8 the purposes of paragraph (1) whether a potentially
9 responsible party or group of potentially responsible
10 parties will perform a response action properly and
11 promptly in accordance with requirements of this
12 Act, and in determining the appropriate level of
13 oversight required for performance by a potentially
14 responsible party or group of potentially responsible
15 parties of a response action, the President shall con-
16 sider factors that include—

17 “(A) the technical and financial capability
18 of the potentially responsible party or group of
19 potentially responsible parties;

20 “(B) the willingness of the potentially re-
21 sponsible party or group of potentially respon-
22 sible parties to complete performance of the re-
23 sponse action within the period of time pre-
24 scribed by the President.

1 “(C) the assurance of the potentially re-
2 sponsible party or group of potentially respon-
3 sible parties that it will comply with the re-
4 quirements of this Act, the National Contingency
5 Plan, and guidelines issued by the
6 Administrator;

7 “(D) the level of effort that the Environ-
8 mental Protection Agency has expended in re-
9 viewing performance by the potentially respon-
10 sible party or group of potentially responsible
11 parties in other instances regulated by the
12 Agency;

13 “(E) the history of cooperation of the po-
14 tentially responsible party or group of poten-
15 tially responsible parties in other Agency
16 actions;

17 “(F) the level of concern of the local
18 community;

19 “(G) the degree of technical complexity or
20 uncertainty associated with the response action
21 to be performed; and

22 “(H) the resources of the Environmental
23 Protection Agency.

24 “(d) DRAFT PROPOSED REMEDIAL ACTION
25 PLANS.—

1 “(1) IN GENERAL.—The Administrator shall
2 issue guidelines identifying the contents of a draft
3 proposed remedial action plan, which shall include,
4 at a minimum—

5 “(A) a brief description of the remedial al-
6 ternatives that were analyzed, including the re-
7 spective capital costs, operation and mainte-
8 nance costs, and estimated present worth costs
9 of the remedial alternatives;

10 “(B) a recommended remedial action alter-
11 native; and

12 “(C) a summary of information relied on
13 to make the recommendation, including a brief
14 description of site risks.

15 “(2) ADMINISTRATIVE RECORD.—Nothing in
16 this paragraph shall affect or impede the establish-
17 ment by the President of an administrative record
18 under section 113(k).

19 “(e) REMEDY REVIEW BOARD.—

20 “(1) ESTABLISHMENT.—

21 “(A) IN GENERAL.—In order to promote
22 cost-effective remedy selection decisions, the
23 Administrator shall establish and appoint the
24 members of at least 1 remedy review board con-
25 sisting of a balance of technical and policy ex-

1 perts within the Environmental Protection
2 Agency and other Federal and State agencies
3 with responsibility for remediating contami-
4 nated facilities.

5 “(B) STATE RESPONSIBILITY.—If respon-
6 sibility for the conduct of a response action at
7 a facility has been transferred to a State under
8 section 130, technical and policy experts from
9 State agencies with responsibility for remediat-
10 ing contaminated facilities shall constitute not
11 less than $\frac{1}{3}$ of the membership of the remedy
12 review board that reviews a draft proposed re-
13 medial action plan for the facility.

14 “(2) PROCEDURES AND CRITERIA.—

15 “(A) PROCEDURES.—Not later than 180
16 days after the date of enactment of this section,
17 the Administrator shall promulgate a regulation
18 that establishes procedures for the operation of
19 remedy review board, including cost-based or
20 other appropriate criteria for determining which
21 draft proposed remedial action plans will be eli-
22 gible for review by a remedy review board.

23 “(B) CRITERIA.—

24 “(i) DIFFERING CRITERIA.—The Ad-
25 ministrator may develop different criteria

1 under subparagraph (A) for different cat-
2 egories of facilities.

3 “(ii) PROPORTION OF FACILITIES ELI-
4 GIBLE FOR REVIEW.—Application of the
5 criteria under subparagraph (A) shall, to
6 the extent practicable, result in the eligi-
7 bility for review of not less than an annual
8 average of $\frac{1}{3}$ of the number of draft pro-
9 posed remedial action plans prepared and
10 ready for issuance for public comment.

11 “(3) REVIEW.—

12 “(A) TIMING.—Subject to paragraph (4),
13 before issuance for public comment, a draft pro-
14 posed remedial action plan that meets the cri-
15 teria under paragraph (2) (B) shall be submit-
16 ted to the remedy review board.

17 “(B) NO REVIEW.—A remedy review board
18 shall not review a remedy that meets the cri-
19 teria under paragraph (2) (B) if the Adminis-
20 trator determines that review by the remedy re-
21 view board would result in an unacceptable
22 delay in taking measures to achieve protection
23 of human health or the environment.

24 “(4) NOTICE AND COMMENT.—

1 “(A) NOTICE.—The Administrator shall
2 give interested parties (including representa-
3 tives of the State and local community in which
4 the facility is located) adequate notice of the
5 submission of a draft proposed remedial action
6 plan to the remedy review board and an oppor-
7 tunity to comment.

8 “(B) COMMENT.—

9 “(i) IN GENERAL.—Potentially re-
10 sponsible parties that are participating in
11 the performance of a remedial investigation
12 and feasibility study shall be permitted to
13 submit comments on a draft remedial ac-
14 tion plan to a remedy review board and be
15 provided a reasonable opportunity to meet
16 with the remedy review board.

17 “(ii) LENGTH OF SUBMISSIONS.—Any
18 limitation on the length of a submission es-
19 tablished by the Administrator shall be ra-
20 tionally related to the level of detail con-
21 tained in the draft proposed plan.

22 “(5) RECOMMENDATIONS.—

23 “(A) IN GENERAL.—A remedy review
24 board shall provide recommendations to the
25 Administrator.

1 “(b) CONSIDERATIONS.—In preparing a
2 recommendation, a remedy review board shall
3 consider—

4 “(i) whether the proposed remedial
5 action meets the requirements of section
6 121;

7 “(ii) the nature of the facility;

8 “(iii) the risks posed by the facility;

9 “(iv) the opinions of the affected En-
10 vironmental Protection Agency regional ad-
11 ministrator and State government regard-
12 ing the proposed remedial action;

13 “(v) the quality and reasonableness of
14 the cost estimates; and

15 “(vi) any other relevant factors that
16 the Administrator considers appropriate.

17 “(B) EPA CONSIDERATION OF REC-
18 OMMENDATIONS.—

19 “(i) SUBSTANTIAL WEIGHT.—In de-
20 termining whether to modify a draft pro-
21 posed remedial action plan, the Adminis-
22 trator shall give substantial weight to the
23 recommendations of a remedy review
24 board.

1 “(ii) DECISION NOT TO FOLLOW REC-
2 COMMENDATION.—A decision by the Admin-
3 istrator not to follow a recommendation of
4 the remedy review board shall not, by it-
5 self, render a decision arbitrary and capri-
6 cious.

7 “(f) APPROVAL OF DRAFT PROPOSED REMEDIAL AC-
8 TION PLAN.—The President may approve a draft pro-
9 posed remedial action plan prepared by a potentially re-
10 sponsible party or group of potentially responsible parties
11 that the President has determined to be qualified under
12 subsection (c). If the President approves the draft pro-
13 posed remedial action plan, the President may treat the
14 document as the President’s proposed plan, and provide
15 it to the public for comment under section 117(a).”.

16 **SEC. 405. COMPLETION OF PHYSICAL CONSTRUCTION AND**
17 **DELISTING.**

18 Title I of the Comprehensive Environmental Re-
19 sponse, Compensation, and Liability Act of 1980 (42
20 U.S.C. 9601 et seq.) (as amended by section 404) is
21 amended by adding at the end the following:

22 **“SEC. 135. COMPLETION OF PHYSICAL CONSTRUCTION AND**
23 **DELISTING.**

24 “(a) IN GENERAL.—

1 “(1) PROPOSED NOTICE OF COMPLETION AND
2 PROPOSED DELISTING.—Not later than 180 days
3 after the completion by the President of physical
4 construction necessary to implement a response ac-
5 tion at a facility, or not later than 180 days after
6 receipt of a notice of such completion from the im-
7 plementing party, the President shall publish a no-
8 tice of completion and proposed delisting of the facil-
9 ity from the National Priorities List in the Federal
10 Register and in a newspaper of general circulation
11 in the area where the facility is located.

12 “(2) PHYSICAL CONSTRUCTION.—For the pur-
13 poses of paragraph (1), physical construction nec-
14 essary to implement a response action at a facility
15 shall be considered to be complete when—

16 “(A) construction of all systems, struc-
17 tures, devices, and other components necessary
18 to implement a response action for the entire
19 facility has been completed in accordance with
20 the remedial design plan; or

21 “(B) no construction, or no further con-
22 struction, is expected to be undertaken.

23 “(3) CONSTRUCTION COMPLETE BEFORE EN-
24 ACTMENT.—Any facility at which physical construc-
25 tion necessary to implement a response action has

1 been completed before the date of enactment of this
2 section shall qualify for a proposed delisting under
3 paragraph (1), if the procedures set out in para-
4 graph (1) for seeking a proposal to delist the facility
5 are followed.

6 “(4) COMMENTS.—The public shall be provided
7 30 days in which to submit comments on the notice
8 of completion and proposed delisting.

9 “(5) FINAL NOTICE.—

10 “(A) IN GENERAL.—Not later than 60
11 days after the end of the comment period, or
12 such extended period as may be determined
13 under subparagraph (B), the President shall—

14 “(i) issue a final notice of completion
15 and delisting or a notice of withdrawal of
16 the proposed notice until the implementa-
17 tion of the remedial action is determined to
18 be complete; and

19 “(ii) publish the notice in the Federal
20 Register and in a newspaper of general cir-
21 culation in the area where the facility is
22 located.

23 “(B) EXTENSION OF TIME.—The Presi-
24 dent may extend the 60-day period for issuing
25 and publishing a final notice under subpara-

1 graph (A) if the President determines, for good
2 cause, that additional time is needed, and pub-
3 lishes an explanation of the need for more time
4 in the Federal Register and in a newspaper of
5 general circulation in the area where the facility
6 is located.

7 “(6) EFFECT OF DELISTING.—The delisting of
8 a facility shall have no effect on—

9 “(A) liability allocation requirements or
10 cost-recovery provisions otherwise provided in
11 this Act;

12 “(B) any liability of a potentially respon-
13 sible party or the obligation of any person to
14 provide continued operation and maintenance;

15 “(C) the authority of the President to
16 make expenditures from the Fund relating to
17 the facility; or

18 “(D) the enforceability of any consent
19 order or decree relating to the facility.

20 “(b) CERTIFICATION.—A final notice of completion
21 and delisting shall include a certification by the President
22 that the facility has met all of the requirements of the
23 remedial action plan (except requirements for continued
24 operation and maintenance).

25 “(c) FUTURE USE OF A FACILITY.—

1 “(1) FACILITY AVAILABLE FOR UNRESTRICTED
2 USE.—If, after completion of physical construction,
3 a facility is available for unrestricted use and there
4 is no need for continued operation and maintenance,
5 the potentially responsible parties shall have no fur-
6 ther liability under any Federal, State, or local law
7 (including any regulation) for remediation at the fa-
8 cility, unless the President determines, based on new
9 and reliable factual information about the facility,
10 that the facility does not meet the requirements for
11 a remedial action under section 121.

12 “(2) FACILITY NOT AVAILABLE FOR UNRE-
13 STRICTED USE.—If, after completion of physical con-
14 struction, a facility is not available for unrestricted
15 use or there are continued operation and mainte-
16 nance requirements that preclude unrestricted use of
17 the facility, the President shall—

18 “(A) review the status of the facility not
19 less often than every 5 years after the comple-
20 tion of physical construction; and

21 “(B) require additional remedial action at
22 the facility if the President determines, after
23 notice and opportunity for hearing, that the fa-
24 cility does not meet the requirements of section
25 121.

1 “(3) FACILITIES AVAILABLE FOR RESTRICTED
2 USE.—The President may determine that a facility
3 or portion of a facility is available for restricted use
4 while a response action is under way or after phys-
5 ical construction has been completed. The President
6 shall make a determination that uncontaminated
7 portions of the facility are available for unrestricted
8 use when such use would not interfere with ongoing
9 operations and maintenance activities or endanger
10 human health or the environment.

11 “(d) OPERATION AND MAINTENANCE.—The need to
12 perform continued operation and maintenance at a facility
13 shall not be the sole basis for delaying delisting of the fa-
14 cility or issuance of the certification if performance of op-
15 eration and maintenance is subject to a legally enforceable
16 agreement, order, or decree.

17 “(e) CHANGE OF USE OF FACILITY.—

18 “(1) PETITION.—Any person may petition the
19 President to change the use of a facility described in
20 subsection (c) (2) or (3) from that which was the
21 basis of the remedial action plan.

22 “(2) GRANT.—The President may grant a peti-
23 tion under paragraph (1) if the petitioner agrees to
24 implement any additional remedial actions that the
25 President determines are necessary to continue to

1 meet the requirements of section 121, considering
2 the different use of the facility.

3 “(3) RESPONSIBILITY FOR RISK.—When a peti-
4 tion has been granted under paragraph (2), the per-
5 son requesting the change in use of the facility shall
6 be responsible for all risk associated with altering
7 the facility and all costs of implementing any nec-
8 essary additional remedial actions.”.

9 **SEC. 406. TRANSITION RULES FOR FACILITIES CURRENTLY**
10 **INVOLVED IN REMEDY SELECTION.**

11 Title I of the Comprehensive Environmental Re-
12 sponse, Compensation, and Liability Act of 1980 (42
13 U.S.C. 9601 et seq.) (as amended by section 405) is
14 amended by adding at the end the following:

15 **“SEC. 136. REMEDY REVIEW PROCESS.**

16 “(a) DEFINITION OF REMEDY REVIEW BOARD.—In
17 this section, the term “remedy review board” means a
18 remedy review board established under section
19 133(b)(5)(E).

20 “(b) PETITIONS FOR REMEDY UPDATE.—

21 “(1) FILING.—In the case of a facility or oper-
22 able unit with respect to which a record of decision
23 was signed before the date of enactment of this sec-
24 tion and that meets the criteria of paragraph (3),
25 the implementor of the record of decision, not later

1 than 1 year after the date of enactment of this sec-
2 tion, may submit to a remedy review board a peti-
3 tion to update the record of decision to incorporate
4 in the remedial action at the facility or operable unit
5 an alternative technology, methodology, or approach.

6 “(2) PROVISION OF COPIES.—The implementor
7 shall provide a copy of the petition to the State, af-
8 fected Indian tribes, local governments, any applica-
9 ble community action group, and the recipient of
10 any technical assistance grant.

11 “(3) CRITERIA FOR ACCEPTANCE FOR RE-
12 VIEW.—

13 “(A) IN GENERAL.—A remedy review
14 board may accept for review a petition for rem-
15 edy update if the implementor demonstrates
16 that—

17 “(i) the alternative remedial action
18 proposed in the petition meets the require-
19 ments of section 121;

20 “(ii) the Governor of the State in
21 which the facility is located does not object
22 to consideration of the petition;

23 “(iii) the record of decision—

24 “(I) was issued before September
25 27, 1996; or

1 “(II) in the case of a record of
2 decision involving primarily ground
3 water extraction and treatment rem-
4 edies, was issued before October 1,
5 1993; and

6 “(iv)(I) the record of decision has an
7 estimated implementation cost in excess of
8 \$30,000,000; or

9 “(II) the record of decision with an
10 estimated implementation cost of between
11 \$5,000,000 and \$30,000,000, and the al-
12 ternative remedial action achieves a cost
13 saving of at least 50 percent of the total
14 costs of the record of decision.

15 “(B) WAIVER OF COST THRESHOLD.—
16 With the concurrence of the Administrator, a
17 remedy review board may approve a petition
18 that does not meet the cost threshold of sub-
19 paragraph (A)(iv).

20 “(4) PRIORITIZATION OF PETITIONS.—

21 “(A) IN GENERAL.—A remedy review
22 board shall prioritize its decision to accept peti-
23 tions for remedy update based on the criteria of
24 paragraph (2) and the potential cost savings of
25 the proposed remedy update.

1 “(B) CONSIDERATIONS.—When factoring
2 cost savings into the prioritization of petitions
3 for remedy update, a remedy review board shall
4 consider—

5 “(i) the gross cost saving estimated
6 for the proposed remedy update; and

7 “(ii) the proportion of total remedy
8 costs that the saving would represent.

9 “(c) REVIEW FACTORS.—In formulating a rec-
10 ommendation, a remedy review board shall consider fac-
11 tors that include—

12 “(1) the continued relevance of the exposure
13 scenarios and risk assumptions in the original
14 remedy;

15 “(2) the effectiveness of the original cleanup
16 strategy in light of any new information or changed
17 circumstances at the facility;

18 “(3) the appropriateness and attainability of
19 the original cleanup goals;

20 “(4) the ability to enhance the original cleanup
21 strategy through the application of new technologies,
22 methodologies, or approaches;

23 “(5) the level and degree of community, State,
24 tribal, and potentially responsible parties involve-

1 ment and consensus in selecting the original cleanup
2 strategy;

3 “(6) the reasonableness of the original cost esti-
4 mates and whether the costs remain justifiable and
5 cost-effective;

6 “(7) the consistency of the original cleanup
7 strategy with similar remedies selected by the Agen-
8 cy; and

9 “(8) the effectiveness of the original cleanup
10 strategy in meeting the cleanup goals.

11 “(d) RECOMMENDATIONS.—Not later than 180 days
12 after the acceptance of a petition for remedy update, a
13 remedy review board shall—

14 “(1) submit to the Administrator a written rec-
15 ommendation with respect to the petition; and

16 “(2) provide responses to all comments submit-
17 ted during the review process with respect to the
18 petition.

19 “(e) CONSIDERATION OF RECOMMENDATIONS.—In
20 deciding whether to approve a proposed remedy update,
21 the Administrator shall give substantial weight to the rec-
22 ommendation of a remedy review board.

23 “(f) REPORT TO CONGRESS.—

24 “(1) IN GENERAL.—The Administrator shall
25 submit an annual report to Congress on the Admin-

1 istrator’s activity in reviewing and modifying records
2 of decision signed before the date of enactment of
3 this section (whether or not the records of decision
4 meet the criteria under subsection (b)(3))—

5 “(A) to apply the amendments made to
6 section 121 by the Superfund Cleanup Accelera-
7 tion Act of 1997;

8 “(B) to incorporate new information re-
9 garding science, technology, and site conditions;
10 or

11 “(C) to improve the cost-effectiveness of
12 remedial actions.

13 “(2) CONTENTS.—A report under paragraph
14 (1) shall describe—

15 “(A) the petitions for remedy update re-
16 ceived;

17 “(B) the disposition of the petitions for
18 remedy update; and

19 “(C) the cost savings, if any, that are esti-
20 mated to result from the remedy updates.

21 “(g) REMEDIAL ACTION REVIEWS UNDER SECTION
22 121(C).—In conducting remedial action reviews under sec-
23 tion 121(e), the Administrator should—

24 “(1) give priority consideration to records of de-
25 cision that—

1 “(A) were issued before October 1, 1993;
2 and

3 “(B) involve primarily ground water ex-
4 traction and treatment remedies for dense,
5 nonaqueous phase liquids; and

6 “(2) based on the review factors stated in sub-
7 section (c), make a determination whether a remedy
8 update is justified.”.

9 **SEC. 407. NATIONAL PRIORITIES LIST.**

10 (a) **AMENDMENTS.**—Section 105 of the Comprehen-
11 sive Environmental Response, Compensation, and Liabil-
12 ity Act of 1980 (42 U.S.C. 9605) is amended—

13 (1) in subsection (a)(8) by adding at the end
14 the following:

15 “(C) provision that, to the extent practicable, in
16 listing a facility on the National Priorities List, the
17 Administrator will not include any parcel of real
18 property at which no release has actually occurred,
19 but to which a released hazardous substance, pollut-
20 ant, or contaminant has migrated in ground water
21 that has moved through subsurface strata from an-
22 other parcel of real estate at which the release actu-
23 ally occurred, unless—

1 “(i) the ground water is in use as a public
2 drinking water supply or was in such use at the
3 time of the release; and

4 “(ii) the owner or operator of the facility
5 is liable, or is affiliated with any other person
6 that is liable, for any response costs at the fa-
7 cility, through any direct or indirect familial re-
8 lationship, or any contractual, corporate, or fi-
9 nancial relationship other than that created by
10 the instruments by which title to the facility is
11 conveyed or financed.”; and

12 (2) by adding at the end the following:

13 “(h) LISTING OF PARTICULAR PARCELS.—

14 “(1) DEFINITION.—In subsection (a)(8)(C) and
15 paragraph (2) of this subsection, the term ‘parcel of
16 real property’ means a parcel, lot, or tract of land
17 that has a separate legal description from that of
18 any other parcel, lot, or tract of land the legal de-
19 scription and ownership of which has been recorded
20 in accordance with the law of the State in which it
21 is located.

22 “(2) STATUTORY CONSTRUCTION.—Nothing in
23 subsection (a)(8)(C) shall be construed to limit the
24 Administrator’s authority under section 104 to ob-
25 tain access to and undertake response actions at any

1 parcel of real property to which a released hazardous
2 substance, pollutant, or contaminant has migrated in
3 the ground water.”.

4 (b) REVISION OF NATIONAL PRIORITIES LIST.—The
5 President shall revise the National Priorities List to con-
6 form with the amendments made by subsection (a) not
7 later than 180 days of the date of enactment of this Act.

8 **TITLE V—LIABILITY**

9 **SEC. 501. LIABILITY EXCEPTIONS AND LIMITATIONS.**

10 (a) DEFINITIONS.—Section 101 of the Comprehen-
11 sive Environmental Response, Liability, and Compensa-
12 tion Act of 1980 (42 U.S.C. 9601) (as amended by section
13 401) is amended by adding at the end of the following:

14 “(43) CODISPOSAL LANDFILLS.—The ‘term co-
15 disposal landfill’ means a landfill that—

16 “(A) was listed on the National Priorities
17 List as of January 1, 1997;

18 “(B) received for disposal municipal solid
19 waste or sewage sludge; and

20 “(C) may also have received, before the ef-
21 fective date of requirements under subtitle C of
22 the Solid Waste Disposal Act (42 U.S.C. 6921
23 et seq.), any hazardous waste, if the landfill
24 contains predominantly municipal solid waste or

1 sewage sludge that was transported to the land-
2 fill from outside the facility.

3 “(44) MUNICIPAL SOLID WASTE.—The term
4 ‘municipal solid waste’—

5 “(A) means waste material generated by—

6 “(i) a household (such as a single- or
7 multi-family residence) or a public lodging
8 (such as a hotel or motel); or

9 “(ii) a commercial, institutional, or in-
10 dustrial source, to the extent that—

11 “(I) the waste material is essen-
12 tially the same as waste normally gen-
13 erated by a household or public lodg-
14 ing; or

15 “(II) the waste material is col-
16 lected and disposed of with other mu-
17 nicipal solid waste or sewage sludge as
18 part of normal municipal solid waste
19 collection services, and, regardless of
20 when generated, would be condi-
21 tionally exempt small quantity genera-
22 tor waste under the regulation issued
23 under section 3001(d) of the Solid
24 Waste Disposal Act (42 U.S.C.
25 6921(d)); and

1 “(B) includes food and yard waste, paper,
2 clothing, appliances, consumer product packag-
3 ing, disposable diapers, office supplies, cosmet-
4 ics, glass and metal food containers, elementary
5 or secondary school science laboratory waste,
6 and household hazardous waste; but

7 “(C) does not include combustion ash gen-
8 erated by resource recovery facilities or munic-
9 ipal incinerators or waste from manufacturing
10 or processing (including pollution control) oper-
11 ations that is not essentially the same as waste
12 normally generated by a household or public
13 lodging.

14 “(45) MUNICIPALITY.—The term ‘municipality’
15 means—

16 “(A) means a political subdivision of a
17 State (including a city, county, village, town,
18 township, borough, parish, school district, sani-
19 tation district, water district, or other public
20 entity performing local governmental functions);
21 and

22 “(B) includes a natural person acting in
23 the capacity of an official, employee, or agent of
24 any entity described in subparagraph (A) in the
25 performance of a governmental function.

1 “(46) SEWAGE SLUDGE.—The term ‘sewage
2 sludge’ means solid, semisolid, or liquid residue re-
3 moved during the treatment of municipal waste
4 water, domestic sewage, or other waste water at or
5 by publicly owned treatment works.”.

6 (b) EXCEPTIONS AND LIMITATIONS.—Section 107 of
7 the Comprehensive Environmental Response, Compensa-
8 tion, and Liability Act of 1980 (42 U.S.C. 9607) (as
9 amended by section 306(b)) is amended by adding at the
10 end the following:

11 “(q) LIABILITY EXEMPTION FOR MUNICIPAL SOLID
12 WASTE AND SEWAGE SLUDGE.—No person shall be liable
13 to the United States or to any other person (including li-
14 ability for contribution) under this section or any other
15 Federal or State law for any response costs incurred after
16 the date of enactment of this subsection at a facility listed
17 on the National Priorities List to the extent that—

18 “(1) the person is liable solely under subpara-
19 graph (C) or (D) of subsection (a)(1); and

20 “(2) the arrangement for disposal, treatment,
21 or transport for disposal or treatment, or the accept-
22 ance for transport for disposal or treatment, in-
23 volved only municipal solid waste or sewage sludge.

24 “(r) DE MICROMIS CONTRIBUTOR EXEMPTION.—

1 “(1) **IN GENERAL.**—In the case of a vessel or
2 facility listed on the National Priorities List, no per-
3 son described in subparagraph (C) or (D) of sub-
4 section (a)(1) shall be liable to the United States or
5 to any other person (including liability for contribu-
6 tion) for any response costs under this section or
7 any other Federal or State law incurred after the
8 date of enactment of this subsection, if the activity
9 specifically attributable to the person resulted in the
10 disposal or treatment of not more than 200 pounds
11 or 110 gallons of material containing hazardous sub-
12 stances at the vessel or facility before January 1,
13 1997, or such greater amount as the Administrator
14 may determine by regulation.

15 “(2) **EXCEPTION.**—Paragraph (1) shall not
16 apply in a case in which the Administrator deter-
17 mines that material described in paragraph (1) has
18 contributed or may contribute significantly to the
19 amount of response costs at the facility.

20 “(s) **SMALL BUSINESS EXEMPTION.**—No person
21 shall be liable to the United States or to any person (in-
22 cluding liability for contribution) under this section or any
23 other Federal or State law for any response costs at a
24 facility listed on the National Priorities List incurred after
25 the date of enactment of this subsection if the person is

1 a business that, during the taxable year preceding the date
2 of transmittal of notification that the business is a poten-
3 tially responsible party, had full- and part-time employees
4 whose combined time was equivalent to 30 or fewer full-
5 time employees or for that taxable year reported
6 \$3,000,000 or less in annual gross revenues.

7 “(t) CODISPOSAL LANDFILL EXEMPTION AND LIM-
8 TATIONS.—

9 “(1) EXEMPTION.—No person shall be liable to
10 the United States or to any person (including liabil-
11 ity for contribution) under this section or any other
12 Federal or State law for any response costs at a fa-
13 cility listed on the National Priorities List incurred
14 after the date of enactment of this subsection to the
15 extent that—

16 “(A) the person is liable under subpara-
17 graph (C) or (D) of subsection (a)(1); and

18 “(B) the arrangement for disposal, treat-
19 ment, or transport for disposal or treatment or
20 the acceptance for disposal, treatment, or trans-
21 port for disposal or treatment occurred with re-
22 spect to a codisposal landfill.

23 “(2) LIMITATIONS.—

24 “(A) DEFINITIONS.—In this paragraph:

1 “(i) LARGE MUNICIPALITY.—The
2 term ‘large municipality’ means a munic-
3 pality with a population of 100,000 or
4 more according to the 1990 census.

5 “(ii) SMALL MUNICIPALITY.—The
6 term ‘small municipality’ means a munic-
7 pality with a population of less than
8 100,000 according to the 1990 census.

9 “(B) AGGREGATE LIABILITY OF SMALL
10 MUNICIPALITIES.—With respect to a codisposal
11 landfill that is owned or operated only by small
12 municipalities and that is not subject to the cri-
13 teria for solid waste landfills published under
14 subtitle D of the Solid Waste Disposal Act (42
15 U.S.C. 6941 et seq.) at part 258 of title 40,
16 Code of Federal Regulations (or a successor
17 regulation), the aggregate liability of all small
18 municipalities for response costs under this sec-
19 tion or any other Federal or State law shall be
20 the lesser of—

21 “(i) 10 percent of the total amount of
22 response costs at the facility; or

23 “(ii) the costs of compliance with the
24 requirements of subtitle D of the Solid
25 Waste Disposal Act (42 U.S.C. 6941 et

1 seq.) for the facility (as if the facility had
2 continued to accept municipal solid waste
3 through January 1, 1997);.

4 “(C) AGGREGATE LIABILITY OF LARGE
5 MUNICIPALITIES.—With respect to a codisposal
6 landfill that is owned or operated only by large
7 municipalities and that is not subject to the cri-
8 teria for solid waste landfills published under
9 subtitle D of the Solid Waste Disposal Act (42
10 U.S.C. 6941 et seq.) at part 258 of title 40,
11 Code of Federal Regulations (or a successor
12 regulation), the aggregate liability of all large
13 municipalities for response costs incurred on or
14 after the date of enactment of this subsection
15 under this section or any other Federal or State
16 law shall be the lesser of—

17 “(i) 20 percent of the total amount of
18 response costs at the facility; or

19 “(ii) the costs of compliance with the
20 requirements of subtitle D of the Solid
21 Waste Disposal Act (42 U.S.C. 6941 et
22 seq.) for the facility (as if the facility had
23 continued to accept municipal solid waste
24 through January 1, 1997).

1 “(D) AGGREGATE PERSONS OTHER THAN
2 MUNICIPALITIES.—With respect to a codisposal
3 landfill that is owned or operated in whole or in
4 part by persons other than municipalities and
5 that is not subject to the criteria for solid waste
6 landfills published under subtitle D of the Solid
7 Waste Disposal Act (42 U.S.C. 6941 et seq.) at
8 part 258 of title 40, Code of Federal Regula-
9 tions (or a successor regulation), the aggregate
10 liability of all persons other than municipalities
11 for response costs incurred on or after the date
12 of enactment of this subsection under this sec-
13 tion or any other Federal or State law shall be
14 the lesser of—

15 “(i) 40 percent of the total amount of
16 response costs at the facility; or

17 “(ii) the costs of compliance with the
18 requirements of subtitle D of the Solid
19 Waste Disposal Act (42 U.S.C. 6941 et
20 seq.) for the facility (as if the facility had
21 continued to accept municipal solid waste
22 through January 1, 1997).

23 “(E) AGGREGATE LIABILITY FOR MUNICI-
24 PALITIES AND NON-MUNICIPALITIES.—With re-
25 spect to a codisposal landfill that is owned and

1 operated by a combination of small and large
2 municipalities or persons other than municipali-
3 ties and that is not subject to the criteria for
4 solid waste landfills published under subtitle D
5 of the Solid Waste Disposal Act (42 U.S.C.
6 6941 et seq.) at part 258 of title 40, Code of
7 Federal Regulations (or a successor regula-
8 tion)—

9 “(i) the allocator shall determine the
10 proportion of the use of the landfill that
11 was made by small and large municipalities
12 and persons other than municipalities dur-
13 ing the time the facility was in operation;
14 and

15 “(ii) shall allocate among the parties
16 an appropriate percentage of total liability
17 not exceeding the aggregate liability per-
18 centages stated in (B)(ii), (C)(ii), (D)(ii),
19 respectively.

20 “(F) LIABILITY AT SUBTITLE D FACILI-
21 TIES.—With respect to a codisposal landfill that
22 is owned and operated by a small municipality,
23 large municipality, or person other than munici-
24 palities, or a combination of thereof, and that
25 is subject to the criteria for solid waste landfills

1 published under subtitle D of the Solid Waste
2 Disposal Act (42 U.S.C. 6941 et seq.) at part
3 258 of title 40, Code of Federal Regulations (or
4 a successor regulation), the aggregate liability
5 for response costs of such municipalities and
6 persons shall be no greater than the costs of
7 compliance with the requirements of subtitle D
8 of the Solid Waste Disposal Act (42 U.S.C.
9 6941 et seq.) for the facility.

10 “(3) APPLICABILITY.—This subsection shall not
11 apply to—

12 “(A) a person that acted in violation of
13 subtitle C of the Solid Waste Disposal Act (42
14 U.S.C. Sec. 6921 et seq.) at a facility that is
15 subject to a response action under this title, if
16 the violation pertains to a hazardous substance
17 the release of threat of release of which caused
18 the incurrence of response costs at the facility;

19 “(B) a person that owned or operated a
20 codisposal landfill in violation of the applicable
21 requirements for municipal solid waste landfill
22 units under subtitle D of the Solid Waste Dis-
23 posal Act (42 U.S.C. Sec. 6941 et seq.) after
24 October 9, 1991, if the violation pertains to a
25 hazardous substance the release of threat of re-

1 lease of which caused the incurrence of response
2 costs at the facility;

3 “(C) a person described in section 136(p);
4 or

5 “(D) a person that impedes the perform-
6 ance of a response action.”.

7 (c) **EFFECTIVE DATE AND TRANSITION RULES.—**

8 The amendments made by this section—

9 (1) shall take effect with respect to an action
10 under section 106, 107, or 113 of the Comprehen-
11 sive Environmental Response, Compensation, and
12 Liability Act of 1980 (42 U.S.C. 9606, 9607, and
13 9613) that becomes final on or after the date of en-
14 actment of this Act; but

15 (2) shall not apply to an action brought by any
16 person under section 107 or 113 of that Act (42
17 U.S.C. 9607 and 9613) for costs or damages in-
18 curred by the person before the date of enactment
19 of this Act.

20 **SEC. 502. CONTRIBUTION FROM THE FUND.**

21 Section 112 of the Comprehensive Environmental Re-
22 sponse, Compensation, and Liability Act of 1980 (42
23 U.S.C. 9612) is amended by adding at the end the follow-
24 ing:

25 “(g) **CONTRIBUTION FROM THE FUND.—**

1 “(1) COMPLETION OF OBLIGATIONS.—A person
2 that is undertaking a response action pursuant to an
3 administrative order issued under section 106 or has
4 entered into a settlement decree with the United
5 States or a State as of the date of enactment of this
6 subsection shall complete the person’s obligations
7 under the order or settlement decree.

8 “(2) CONTRIBUTION.—A person described in
9 paragraph (1) shall receive contribution from the
10 Fund for any portion of the costs (excluding attor-
11 neys’ fees) incurred for the performance of the re-
12 sponse action after the date of enactment of this
13 subsection if the person is not liable for such costs
14 by reason of a liability exemption or limitation under
15 this section.

16 “(3) APPLICATION FOR CONTRIBUTION.—

17 “(A) IN GENERAL.—Contribution under
18 this section shall be made upon receipt by the
19 Administrator of an application requesting con-
20 tribution.

21 “(B) PERIODIC APPLICATIONS.—Beginning
22 with the 7th month after the date of enactment
23 of this subsection, 1 application for each facility
24 shall be submitted every 6 months for all per-

1 sons with contribution rights (as determined
2 under subparagraph (2)).

3 “(4) REGULATIONS.—Contribution shall be
4 made in accordance with such regulations as the Ad-
5 ministrator shall issue within 180 days after the
6 date of enactment of this section.

7 “(5) DOCUMENTATION.—The regulations under
8 paragraph (4) shall, at a minimum, require that an
9 application for contribution contain such documenta-
10 tion of costs and expenditures as the Administrator
11 considers necessary to ensure compliance with this
12 subsection.

13 “(6) EXPEDITION.—The Administrator shall
14 develop and implement such procedures as may be
15 necessary to provide contribution to such persons in
16 an expeditious manner, but in no case shall a con-
17 tribution be made later than 1 year after submission
18 of an application under this subsection.

19 “(7) CONSISTENCY WITH NATIONAL CONTIN-
20 GENCY PLAN.—No contribution shall be made under
21 this subsection unless the Administrator determines
22 that such costs are consistent with the National
23 Contingency Plan.”.

1 **SEC. 503. EXPEDITED SETTLEMENT FOR CERTAIN PARTIES.**

2 Section 122 of the Comprehensive Environmental Re-
3 sponse, Compensation, and Liability Act of 1980 (42
4 U.S.C. 9622) is amended by striking subsection (g) and
5 inserting the following:

6 “(g) EXPEDITED SETTLEMENT FOR CERTAIN PAR-
7 TIES.—

8 “(1) PARTIES ELIGIBLE.—Any party described
9 in subparagraph (C) or (D) of subsection (a)(1) that
10 is liable to the United States or any other person for
11 response costs incurred after the date of enactment
12 of the Superfund Cleanup Acceleration Act of 1997
13 at a vessel or facility that is listed on the National
14 Priorities List shall be eligible for an expedited set-
15 tlement with the Administrator if no activity specifi-
16 cally attributable to the person resulted, before Jan-
17 uary 1, 1997, in the disposal or treatment of more
18 than 1 percent of the volume of material containing
19 a hazardous substance at the vessel or facility.

20 “(2) REOPENING OF SETTLEMENT.—

21 “(A) IN GENERAL.—Except as provided in
22 subparagraph (B), an expedited settlement
23 agreement under paragraph (1) shall contain a
24 provision that allows the Administrator to re-
25 open the settlement agreement if, pursuant to
26 section 136, the allocator determines that the

1 settling party did not meet the requirement of
2 paragraph (1).

3 “(B) FINALITY.—A settlement shall not be
4 subject to the requirement of subparagraph (A)
5 if the settling party pays a premium, as deter-
6 mined by the Administrator, of not to exceed 10
7 percent of the amount of the settlement.”.

8 **SEC. 504. ALLOCATION OF LIABILITY FOR CERTAIN FACILI-**
9 **TIES.**

10 Title I of the Comprehensive Environmental Re-
11 sponse, Compensation, and Liability Act of 1980 (42
12 U.S.C. 9601 et seq.) (as amended by section 406) is
13 amended by adding at the end the following:

14 **“SEC. 136. ALLOCATION OF LIABILITY FOR CERTAIN FA-**
15 **CILITIES.**

16 “(a) DEFINITIONS.—In this section:

17 “(1) ALLOCATED SHARE.—The term ‘allocated
18 share’ means the percentage of liability assigned to
19 a potentially responsible party by the allocator in an
20 allocation report under subsection (d)(5).

21 “(2) ALLOCATION PARTY.—The term ‘allocation
22 party’ means a party, named on a list of parties is-
23 sued by an allocator, that will be subject to the allo-
24 cation process under this section.

1 “(3) ALLOCATOR.—The term ‘allocator’ means
2 an allocator retained to conduct an allocation for a
3 facility under this section.

4 “(4) MANDATORY ALLOCATION FACILITY.—The
5 term ‘mandatory allocation facility’ means—

6 “(A) a non-federally owned vessel or facil-
7 ity listed on the National Priorities List with
8 respect to which response costs are incurred
9 after the date of enactment of this section and
10 at which there are 2 or more potentially respon-
11 sive persons (including 1 or more persons that
12 are qualified for an exemption under subsection
13 (q), (r), or (s) of section 107), if at least 1 po-
14 tentially responsible person is viable and not en-
15 titled to an exemption under subsection (q), (r),
16 or (s) of section 107;

17 “(B) a federally owned vessel or facility
18 listed on the National Priorities List with re-
19 spect to which response costs are incurred after
20 the date of enactment of this section, and with
21 respect to which 1 or more potentially respon-
22 sible parties (other than a department, agency,
23 or instrumentality of the United States) are lia-
24 ble or potentially liable if at least 1 potentially
25 liable party is liable and not entitled to an ex-

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1 emption under subsection (q), (r), or (s) of sec-
2 tion 107; and

3 “(C) a codisposal landfill with respect to
4 which—

5 “(i) costs are incurred after the date
6 of enactment of this section; and

7 “(ii)(I) by virtue of section 107(t)(3),
8 a person is not entitled to the exemption
9 under section 107(t)(1) or the limitation
10 under section 107(t)(2); or

11 “(II) more than 1 person is entitled to
12 the limitation under section 107(t)(2).

13 “(5) ORPHAN SHARE.—The term ‘orphan
14 share’ means the total of the allocated shares deter-
15 mined by the allocator under subsection (f).

16 “(b) ALLOCATIONS OF LIABILITY.—

17 “(1) MANDATORY ALLOCATIONS.—

18 “(A) IN GENERAL.—For each mandatory
19 allocation facility involving 2 or more poten-
20 tially responsible parties (including 1 or more
21 potentially responsible parties that are qualified
22 for an exemption under subsection (q), (r), or
23 (s) of section 107), the Administrator shall con-
24 duct the allocation process under this section.

25 “(B) CODISPOSAL LANDFILLS.—

1 “(i) IN GENERAL.—For a facility de-
2 scribed in subsection (a)(4)(C), the alloca-
3 tion parties shall include only persons de-
4 scribed in clause (ii).

5 “(ii) PERSONS DESCRIBED.—The per-
6 sons described in this clause are—

7 “(I) a person that is, by virtue of
8 section 107(t)(3), not entitled to the
9 exemption under section 107(t)(1) or
10 the limitation under section 107(t)(2);
11 and

12 “(II) if more than 1 person is en-
13 titled to the limitation under section
14 107(t)(2), those persons.

15 “(2) REQUESTED ALLOCATIONS.—For a facility
16 (other than a mandatory allocation facility) involving
17 2 or more potentially responsible parties, the Admin-
18 istrator may conduct the allocation process under
19 this section if the allocation is requested in writing
20 by a potentially responsible party that has—

21 “(A) incurred response costs with respect
22 to a response action; or

23 “(B) resolved any liability to the United
24 States with respect to a response action in

1 order to assist in allocating shares among po-
2 tentially responsible parties.

3 “(3) ORPHAN SHARE.—An allocation performed
4 at a vessel or facility identified under paragraph (2)
5 shall not require payment of an orphan share under
6 subsection (f) or contribution under subsection (l).

7 “(4) EXCLUDED FACILITIES.—

8 “(A) CERTAIN CODISPOSAL FACILITIES.—
9 A codisposal landfill at which costs are incurred
10 after January 1, 1997, and at which there is
11 only 1 party subject to section 107(t)(2) and all
12 other potentially responsible persons are enti-
13 tled to the liability exemption under section
14 107(t)(1) shall not be considered to be a man-
15 datory allocation facility for the purposes of
16 paragraph (1).

17 “(B) FINAL ORDERS.—A facility for which
18 there was in effect as of the date of enactment
19 of this section a settlement decree or order that
20 determines the liability and allocated shares of
21 all potentially responsible parties with respect
22 to the response action shall not be considered to
23 be a mandatory allocation facility for the pur-
24 poses of paragraph (1).

1 “(C) AVAILABILITY OF ORPHAN SHARE.—

2 For any facility that is otherwise excluded by
3 subparagraph (A) and for which there was not
4 in effect as of the date of enactment of this sec-
5 tion a final judicial order that determined the
6 liability of all parties to the action for response
7 costs incurred after the date of enactment of
8 this section, an allocation shall be conducted for
9 the sole purpose of determining the availability
10 of orphan share funding under subsection (f)(1)
11 for any response costs incurred after the date
12 of enactment of this section.

13 “(5) SCOPE OF ALLOCATIONS.—An allocation
14 under this section shall apply to—

15 “(A) response costs incurred after the date
16 of enactment of this section, with respect to a
17 mandatory allocation facility; and

18 “(B) response costs incurred at a facility
19 that is the subject of a requested allocation
20 under paragraph (2).

21 “(6) OTHER MATTERS.—This section shall not
22 limit or affect—

23 “(A) the obligation of the Administrator to
24 conduct the allocation process for a response

1 action at a facility that has been the subject of
2 a partial or expedited settlement;

3 “(B) the ability of any person to resolve
4 any liability, with respect to a facility, to any
5 other person at any time before initiation or
6 completion of the allocation process, subject to
7 subsection (k)(2);

8 “(C) the validity, enforceability, finality, or
9 merits of any judicial or administrative order,
10 judgment, or decree, issued prior to the date of
11 enactment of this section with respect to liabil-
12 ity under this Act; or

13 “(D) the validity, enforceability, finality, or
14 merits of any preexisting contract or agreement
15 relating to any allocation of responsibility or
16 any indemnity for, or sharing of, any response
17 costs under this Act.

18 “(c) MORATORIUM ON LITIGATION AND ENFORCE-
19 MENT.—

20 “(1) IN GENERAL.—No person may assert a
21 claim for recovery of a response cost or contribution
22 toward a response cost (including a claim for insur-
23 ance proceeds for costs incurred after the date of en-
24 actment of this section) under this Act or any other

1 Federal or State law in connection with a response
2 action—

3 “(A) for which an allocation is required to
4 be performed under subsection (b)(1); or

5 “(B) for which the Administrator has initi-
6 ated the allocation process under this section;
7 until the date that is 120 days after the date of issu-
8 ance of a report by the allocator under subsection
9 (d)(5) or, if a second or subsequent report is issued
10 under subsection (j), the date of issuance of the sec-
11 ond or subsequent report.

12 “(2) PENDING ACTIONS OR CLAIMS.—If a claim
13 described in paragraph (1) is pending on the date of
14 enactment of this section or on initiation of an allo-
15 cation under this section, the portion of the claim
16 pertaining to response costs that are the subject of
17 the allocation shall be stayed until the date that is
18 120 days after the date of issuance of a report by
19 the allocator under subsection (d)(5) or, if a second
20 or subsequent report is issued under subsection (j),
21 the date of issuance of the second or subsequent re-
22 port, unless the court determines that a stay would
23 result in manifest injustice.

24 “(3) TOLLING OF PERIOD OF LIMITATION.—

1 “(A) BEGINNING OF TOLLING.—Any appli-
2 cable period of limitation with respect to a
3 claim subject to paragraph (1) shall be tolled
4 beginning on the earlier of—

5 “(i) the date of listing of the facility
6 on the National Priorities List if the list-
7 ing occurs after the date of enactment of
8 this section; or

9 “(ii) the date of initiation of the allo-
10 cation process under this section.

11 “(B) END OF TOLLING.—A period of limi-
12 tation shall be tolled under subparagraph (A)
13 until the date that is 180 days after the date
14 of issuance of a report by the allocator under
15 subsection (d)(5), or of a second or subsequent
16 report under subsection (j).

17 “(d) ALLOCATION PROCESS.—

18 “(1) FLEXIBLE PROCESS.—

19 “(A) IN GENERAL.—Each allocation under
20 this section shall be performed by a neutral
21 third-party allocator in a fair, efficient, and im-
22 partial manner.

23 “(B) COST MINIMIZATION.—The allocator
24 shall make every effort to streamline the alloca-

1 tion process and minimize the cost of conduct-
2 ing the allocation.

3 “(C) OPPORTUNITY FOR COMMENT.—Prior
4 to issuing the final allocation report, the allo-
5 cator shall give each allocation party oppor-
6 tunity to comment on a draft allocation report.

7 “(D) NO JUDICIAL REVIEW.—The actions
8 of the allocator shall not be subject to judicial
9 review.

10 “(2) INITIATION OF ALLOCATION.—The Admin-
11 istrator shall initiate the allocation process for a fa-
12 cility by performing a comprehensive search for all
13 potentially responsible parties at the facility as soon
14 as reasonably practicable.

15 “(3) RETENTION OF ALLOCATOR.—

16 “(A) IN GENERAL.—Not later than 90
17 days after the date of enactment of this section,
18 the Administrator shall establish by rule a proc-
19 ess for the expedited selection and retention by
20 contract of a neutral allocator, acceptable both
21 to the potentially responsible parties and to a
22 representative of the Fund, to conduct the allo-
23 cation under this section.

24 “(B) PARTICIPATION BY ADMINISTRATOR
25 OR ATTORNEY GENERAL.—The Administrator

1 or the Attorney General shall participate in the
2 allocation process as the representative of the
3 Fund from which any orphan share shall be
4 paid.

5 “(C) SUPPORT SERVICES.—Each contract
6 by which the Administrator retains an allocator
7 shall authorize the allocator to acquire reason-
8 able support services.

9 “(D) NO LIMITATION ON DISCRETION.—
10 The Administrator shall not issue any rule, con-
11 tract, or order that limits the discretion of the
12 allocator in the conduct of the allocation.

13 “(4) NOMINATION OF ADDITIONAL ALLOCATION
14 PARTIES.—

15 “(A) IN GENERAL.—The allocator shall
16 allow each potentially responsible party identi-
17 fied by the Administrator under paragraph (2)
18 a period of at least 30 days to submit the
19 names of additional potentially responsible par-
20 ties and supporting information.

21 “(B) INCLUSION OF NOMINATED PER-
22 SONS.—The allocator shall include each person
23 nominated under subparagraph (A) on the list
24 of allocation parties unless it appears from the

1 nomination that there is no basis to believe the
2 person is potentially liable.

3 “(C) RECOVERY OF COSTS BY INAPPROPRI-
4 ATELY NOMINATED PARTIES.—Any allocation
5 party that receives a zero share in the
6 allocator’s final report shall be entitled to re-
7 cover its costs of participating in the allocation
8 process (including a reasonable attorney’s fee)
9 from the person that submitted its name to the
10 allocator.

11 “(5) ALLOCATOR’S REPORT.—The allocator
12 shall provide a written final allocation report to the
13 Administrator and each allocation party that speci-
14 fies the percentage share of responsibility of each al-
15 location party and of any orphan shares.

16 “(6) ALLOCATION BY THE PARTIES.—

17 “(A) IN GENERAL.—The allocator shall
18 allow the allocation parties (including the Ad-
19 ministrator or the Attorney General as the rep-
20 resentative of the fund from which any orphan
21 share will be paid) a 60-day period in which to
22 reach a voluntary settlement.

23 “(B) ADOPTION OF SETTLEMENT BY THE
24 ALLOCATOR.—In lieu of issuing an allocation

1 report, the allocator shall promptly adopt any
2 settlement that—

3 “(i) allocates at least 95 percent of
4 the recoverable costs of a response action
5 at a facility; and

6 “(ii) contains the terms and condi-
7 tions stated in subsection (k)(2)(A)(ii).

8 “(C) NON-SETTLING ALLOCATION
9 PARTY.—An allocation party that does not
10 agree to a settlement under subparagraph (B)
11 shall be subject to post-settlement litigation
12 under subsection (n).

13 “(e) EQUITABLE FACTORS FOR ALLOCATION.—The
14 allocator shall prepare a nonbinding allocation of percent-
15 age shares of responsibility to each allocation party and
16 to the orphan share, in accordance with this section and
17 without regard to any theory of joint and several liability,
18 based on—

19 “(1) the amount of hazardous substances con-
20 tributed by each allocation party;

21 “(2) the degree of toxicity of hazardous sub-
22 stances contributed by each allocation party;

23 “(3) the mobility of hazardous substances con-
24 tributed by each allocation party;

1 “(4) the degree of involvement of each alloca-
2 tion party in the generation, transportation, treat-
3 ment, storage, or disposal of hazardous substances;

4 “(5) the degree of care exercised by each alloca-
5 tion party with respect to hazardous substances, tak-
6 ing into account the characteristics of the hazardous
7 substances;

8 “(6) the cooperation of each allocation party in
9 contributing to any response action and in providing
10 complete and timely information to the allocator;
11 and

12 “(7) such other equitable factors as the allo-
13 cator determines are appropriate.

14 “(f) ORPHAN SHARES.—

15 “(1) MAKEUP OF ORPHAN SHARE.—The orphan
16 share shall consist of—

17 “(A) any share that the allocator deter-
18 mines is attributable to an allocation party that
19 is insolvent or defunct and that is not affiliated
20 with any financially viable allocation party; and

21 “(B) the difference between the aggregate
22 share that the allocator determines is attrib-
23 utable to an allocation party and the aggregate
24 share actually assumed by the allocation party
25 in a settlement with the United States if—

1 “(i) the person is eligible for an expedited settlement with the United States under section 122 based on limited ability to pay response costs;

5 “(ii) the liability of the person is eliminated, limited, or reduced by any provision of this Act; or

8 “(iii) the person settled with the United States before the completion of the allocation.

11 “(2) UNATTRIBUTABLE SHARES.—A share attributable to a hazardous substance that the allocator determines was disposed at the facility that cannot be attributed to any identifiable party shall be distributed among the allocation parties and the orphan share in accordance with the allocated share assigned to each.

18 “(g) INFORMATION-GATHERING AUTHORITY.—

19 “(1) IN GENERAL.—The allocator may gather such information as is necessary to conduct a fair and impartial allocation.

22 “(2) TYPES OF AUTHORITY.—In carrying out paragraph (1), the allocator may—

1 “(A) exercise the information-gathering
2 authority of the President under section 104(e)
3 or issue a subpoena;

4 “(B) request that the Attorney General en-
5 force any information request or subpoena is-
6 sued by the allocator and, if the Attorney Gen-
7 eral does not respond promptly to the request,
8 retain counsel to enforce the information re-
9 quest or subpoena; and

10 “(C) request that the Attorney General
11 seek to impose civil penalties for any failure to
12 submit a complete and timely answer to an in-
13 formation request or subpoena or for any viola-
14 tion of subsection (h), or criminal penalties
15 under section 1001 of title 18, United States
16 Code, for any false or misleading material
17 statement made in connection with the alloca-
18 tion process.

19 “(h) CONFIDENTIALITY OF INFORMATION.—

20 “(1) IN GENERAL.—All persons involved in the
21 allocation shall ensure the confidentiality at all times
22 of all information submitted to the allocator.

23 “(2) CONFIDENTIALITY.—Information submit-
24 ted to the allocator shall not be—

1 “(A) disclosed to any person except as re-
2 quired by court order;

3 “(B) subject to disclosure to any person
4 under section 552 of title 5, United States
5 Code; or

6 “(C) discoverable or admissible in any
7 Federal, State, or local judicial or administra-
8 tive proceeding (if not independently discover-
9 able or admissible).

10 “(3) NO WAIVER.—The submission to the allo-
11 cator of information shall not constitute a waiver of
12 any privilege under any Federal or State law (in-
13 cluding any regulation).

14 “(i) REJECTION OF ALLOCATION REPORT.—

15 “(1) REJECTION.—The Administrator and the
16 Attorney General may jointly reject a report issued
17 by an allocator only if the Administrator and the At-
18 torney General jointly publish, not later than 180
19 days after the Administrator receives the report, a
20 written determination that—

21 “(A) no rational interpretation of the facts
22 before the allocator, in light of the factors re-
23 quired to be considered, would form a reason-
24 able basis for the shares assigned to the parties;
25 or

1 “(B) the allocation process was directly
2 and substantially affected by bias, procedural
3 error, fraud, or unlawful conduct.

4 “(2) FINALITY.—A report issued by an allo-
5 cator may not be rejected after the date that is 180
6 days after the date on which the United States ac-
7 cepts a settlement offer (excluding an expedited set-
8 tlement under section 122) based on the allocation.

9 “(j) SECOND AND SUBSEQUENT ALLOCATIONS.—

10 “(1) IN GENERAL.—If a report is rejected
11 under subsection (i), the allocation parties shall se-
12 lect an allocator to perform, on an expedited basis,
13 a new allocation based, to the extent appropriate, on
14 the same record available to the previous allocator.

15 “(2) MORATORIUM AND TOLLING.—The mora-
16 torium and tolling provisions of subsection (c) shall
17 be extended until the date that is 180 days after the
18 date of issuance of any second or subsequent alloca-
19 tion report under paragraph (1).

20 “(k) SETTLEMENTS BASED ON ALLOCATIONS.—

21 “(1) IN GENERAL.—Unless an allocation report
22 is rejected under subsection (i), any allocation party
23 at a mandatory allocation facility (including an allo-
24 cation party whose allocated share is funded part-
25 ially or fully by orphan share funding under sub-

1 section (f)) shall be entitled to resolve the liability of
2 the party to the United States for response actions
3 subject to allocation if, not later than 90 days after
4 the date of issuance of a report by the allocator, the
5 party—

6 “(A) offers to settle with the United States
7 based on the allocated share specified by the al-
8 locator; and

9 “(B) agrees to the other terms and condi-
10 tions stated in this subsection.

11 “(2) PROVISIONS OF SETTLEMENTS.—

12 “(A) IN GENERAL.—A settlement based on
13 an allocation under this section—

14 “(i) shall provide the Administrator
15 with authority to require that any alloca-
16 tion party or group of parties (other than
17 an allocation party that satisfies the re-
18 quirements of subsection (u)) perform a
19 response action; and

20 “(ii) shall include—

21 “(I) a waiver of contribution
22 rights against all persons that are po-
23 tentially responsible parties for any
24 response action addressed in the set-
25 tlement;

1 “(II) a covenant not to sue that
2 is consistent with section 122(f) and,
3 except in the case of a cash-out settle-
4 ment, provisions regarding perform-
5 ance or adequate assurance of per-
6 formance of the response action;

7 “(III) a premium not to exceed
8 10 percent, that is calculated on a fa-
9 cility-specific basis and reflects the ac-
10 tual risk to the United States of not
11 collecting unrecovered response costs
12 for the response action;

13 “(IV) complete protection from
14 all claims for contribution regarding
15 the cost of a response action incurred
16 after the date of enactment of this
17 section that are addressed in the set-
18 tlement; and

19 “(V) provisions through which a
20 settling party shall receive prompt
21 contribution from the Fund under
22 subsection (l) of any response costs
23 incurred by the party for any response
24 action that is the subject of the alloca-
25 tion in excess of the allocated share of

1 the party, including the allocated por-
2 tion of any orphan share.

3 “(B) NOT CONTINGENT.—Contribution
4 under subparagraph (A)(v) shall not be contin-
5 gent on recovery by the United States of any
6 response costs from any person other than the
7 settling party.

8 “(1) POST-ALLOCATION CONTRIBUTION.—

9 “(1) IN GENERAL.—An allocation party (includ-
10 ing a party that is subject to an order under section
11 106 or a settlement decree) that incurs costs after
12 the date of enactment of this section for implemen-
13 tation of a response action that is the subject of an
14 allocation under this section to an extent that ex-
15 ceeds the percentage share of the allocation party, as
16 determined by the allocator, shall be entitled to
17 prompt payment of contribution for the excess
18 amount, including any orphan share, from the Fund,
19 unless the allocation report is rejected under sub-
20 section (i).

21 “(2) NOT CONTINGENT.—The right to contribu-
22 tion under paragraph (1) shall not be contingent on
23 recovery by the United States of a response cost
24 from any other person.

25 “(3) TERMS AND CONDITIONS.—

1 “(A) RISK PREMIUM.—A contribution pay-
2 ment shall be reduced by an amount not ex-
3 ceeding the litigation risk premium under sub-
4 section (k)(2)(A)(ii)(III) that would apply to a
5 settlement by the allocation party concerning
6 the response action, based on the total allocated
7 shares of the parties that have not reached a
8 settlement with the United States.

9 “(B) TIMING.—

10 “(i) IN GENERAL.—A contribution
11 payment shall be paid out during the
12 course of the response action that was the
13 subject of the allocation, using reasonable
14 progress payments at significant mile-
15 stones.

16 “(ii) CONSTRUCTION.—Contribution
17 for the construction portion of the work
18 shall be paid out not later than 120 days
19 after the date of completion of the con-
20 struction unless construction takes longer
21 than 1 year, in which case contribution
22 shall be made in appropriate periodic pay-
23 ments.

24 “(C) EQUITABLE OFFSET.—A contribution
25 payment shall be subject to equitable offset or

1 recoupment by the Administrator at any time if
2 the allocation party fails to perform the work in
3 a proper and timely manner.

4 “(D) INDEPENDENT AUDITING.—The Ad-
5 ministrator may require independent auditing
6 of any claim for contribution.

7 “(E) WAIVER.—An allocation party that
8 receives contribution under this section waives
9 the right to seek recovery of response costs in-
10 curred after the date of enactment of this sec-
11 tion in connection with the response action, or
12 contribution toward the response costs incurred
13 after the date of enactment of this section, from
14 any other person potentially liable under this
15 Act.

16 “(F) BAR.—An administrative order under
17 section 106(a) shall be in lieu of any action by
18 the United States or any other person against
19 the allocation party for recovery of response
20 costs in connection with the response action, or
21 for contribution toward the costs of the re-
22 sponse action that is subject to the allocation
23 process under this section.

24 “(m) FUNDING OF ORPHAN SHARES.—

1 “(1) CONTRIBUTION.—For each settlement en-
2 tered into under subsection (k) and each administra-
3 tive order or settlement decree to which subsection
4 (1) applies, the Administrator shall promptly provide
5 contribution to the settling allocation parties as pro-
6 vided in those subsections.

7 “(2) ENTITLEMENT.—Paragraph (1) con-
8 stitutes an entitlement to any allocation party eligi-
9 ble to receive contribution.

10 “(3) AMOUNTS OWED.—

11 “(A) DELAY IF FUNDS ARE UNAVAIL-
12 ABLE.—If funds are unavailable in any fiscal
13 year to provide contribution to all allocation
14 parties under paragraph (1), the Administrator
15 may delay payment until funds are available.

16 “(B) PRIORITY.—The priority for con-
17 tribution shall be based on the length of time
18 that has passed since the settlement between
19 the United States and the allocation parties
20 under subsection (k).

21 “(C) PAYMENT FROM FUNDS MADE AVAIL-
22 ABLE IN SUBSEQUENT FISCAL YEARS.—Any
23 amount due and owing in excess of available ap-
24 propriations in any fiscal year shall be paid
25 from amounts made available in subsequent fis-

1 cal years, along with interest on the unpaid bal-
2 ances at the rate equal to that of the current
3 average market yield on outstanding marketable
4 obligations of the United States with a maturity
5 of 1 year.

6 “(4) AUDITING.—The Administrator may re-
7 quire an independent auditing of any claim for con-
8 tribution.

9 “(n) POST-SETTLEMENT LITIGATION.—

10 “(1) IN GENERAL.—Subject to subsections (j)
11 and (k), and on the expiration of the moratorium pe-
12 riod under subsection (c), the Administrator may
13 commence an action under section 107 against an
14 allocation party that has not resolved the liability of
15 the party to the United States following allocation
16 and may seek to recover response costs not recov-
17 ered through settlements with other persons.

18 “(2) IMPLADER.—A defendant in an action
19 under paragraph (1) may implead an allocation
20 party only if the allocation party did not resolve its
21 liability to the United States.

22 “(3) RESPONSE COSTS.—

23 “(A) ALLOCATION PROCESS.—The cost of
24 implementing the allocation process under this
25 section, including reasonable fees and expenses

1 of the allocator, shall be considered to be a nec-
2 essary response cost.

3 “(B) FUNDING OF ORPHAN SHARES.—The
4 cost attributable to funding an orphan share
5 under this section—

6 “(i) shall be considered to be a nec-
7 essary response cost; and

8 “(ii) shall be recoverable under section
9 107 only from an allocation party that
10 does not reach a settlement under sub-
11 section (k) and has not received an admin-
12 istrative order issued under section 106.

13 “(o) RETAINED AUTHORITY.—Except as specifically
14 provided in this section, this section does not affect the
15 authority of the Administrator to—

16 “(1) exercise the powers conferred by section
17 103, 104, 105, 106, or 122;

18 “(2) commence an action against a party if
19 there is a contemporaneous filing of a judicial con-
20 sent decree resolving the liability of the party;

21 “(3) file a proof of claim or take other action
22 in a proceeding under title 11, United States Code;
23 or

1 “(4) require implementation of a response ac-
2 tion at an allocation facility during the conduct of
3 the allocation process.

4 “(p) ILLEGAL ACTIVITIES.—Subsections (o), (p), (q),
5 (r), (s), (t), (u), (v), and (w) of section 107 and section
6 112(g) shall not apply to any person whose liability for
7 response costs under section 107(a)(1) is otherwise based
8 on any act, omission, or status that is determined by a
9 court or administrative body of competent jurisdiction,
10 within the applicable statute of limitation, to have been
11 a violation of any Federal or State law pertaining to the
12 treatment, storage, disposal, or handling of hazardous
13 substances if the violation pertains to a hazardous sub-
14 stance, the release or threat of release of which caused
15 the incurrence of response costs at the vessel or facility.”.

16 **SEC. 505. LIABILITY OF RESPONSE ACTION CONTRACTORS.**

17 (a) LIABILITY OF CONTRACTORS.—Section 101(20)
18 of the Comprehensive Environmental Response, Com-
19 pensation, and Liability Act of 1980 (42 U.S.C. 9601(20))
20 is amended by adding at the end the following:

21 “(H) LIABILITY OF CONTRACTORS.—

22 “(i) IN GENERAL.—The term ‘owner
23 or operator’ does not include a response
24 action contractor (as defined in section
25 119(e)).

1 “(ii) LIABILITY LIMITATIONS.—A per-
2 son described in clause (i) shall not, in the
3 absence of negligence by the person, be
4 considered to—

5 “(I) cause or contribute to any
6 release or threatened release of a haz-
7 ardous substance, pollutant, or con-
8 taminant;

9 “(II) arrange for disposal or
10 treatment of a hazardous substance,
11 pollutant, or contaminant;

12 “(III) arrange with a transporter
13 for transport or disposal or treatment
14 of a hazardous substance, pollutant,
15 or contaminant; or

16 “(IV) transport a hazardous sub-
17 stance, pollutant, or contaminant.

18 “(iii) EXCEPTION.—This subpara-
19 graph does not apply to a person poten-
20 tially responsible under section 106 or 107
21 other than a person associated solely with
22 the provision of a response action or a
23 service or equipment ancillary to a re-
24 sponse action.”.

1 (b) NATIONAL UNIFORM NEGLIGENCE STANDARD.—
2 Section 119(a) of the Comprehensive Environmental Re-
3 sponse, Compensation, and Liability Act of 1980 (42
4 U.S.C. 9619(a)) is amended—

5 (1) in paragraph (1) by striking “title or under
6 any other Federal law” and inserting “title or under
7 any other Federal or State law”; and

8 (2) in paragraph (2)—

9 (A) by striking “(2) NEGLIGENCE, ETC.—
10 Paragraph (1)” and inserting the following:

11 “(2) NEGLIGENCE AND INTENTIONAL MIS-
12 CONDUCT; APPLICATION OF STATE LAW.—

13 “(A) NEGLIGENCE AND INTENTIONAL MIS-
14 CONDUCT.—

15 “(i) IN GENERAL.—Paragraph (1);
16 and

17 (B) by adding at the end the following:

18 “(ii) STANDARD.—Conduct under
19 clause (i) shall be evaluated based on the
20 generally accepted standards and practices
21 in effect at the time and place at which the
22 conduct occurred.

23 “(iii) PLAN.—An activity performed
24 in accordance with a plan that was ap-
25 proved by the Administrator shall not be

1 considered to constitute negligence under
2 clause (i).

3 “(B) APPLICATION OF STATE LAW.—Para-
4 graph (1) shall not apply in determining the li-
5 ability of a response action contractor under the
6 law of a State if the State has adopted by stat-
7 ute a law determining the liability of a response
8 action contractor.”.

9 (c) EXTENSION OF INDEMNIFICATION AUTHORITY.—
10 Section 119(c)(1) of the Comprehensive Environmental
11 Response, Compensation, and Liability Act of 1980 (42
12 U.S.C. 9619(c)(1)) is amended by adding at the end the
13 following: “The agreement may apply to a claim for neg-
14 ligence arising under Federal or State law.”.

15 (d) INDEMNIFICATION DETERMINATIONS.—Section
16 119(c) of the Comprehensive Environmental Response,
17 Compensation, and Liability Act of 1980 (42 U.S.C.
18 9619(c)) is amended by striking paragraph (4) and insert-
19 ing the following:

20 “(4) DECISION TO INDEMNIFY.—

21 “(A) IN GENERAL.—For each response ac-
22 tion contract for a vessel or facility, the Admin-
23 istrator shall make a decision whether to enter
24 into an indemnification agreement with a re-
25 sponse action contractor.

1 “(B) STANDARD.—The Administrator shall
2 enter into an indemnification agreement to the
3 extent that the potential liability (including the
4 risk of harm to public health, safety, environ-
5 ment, and property) involved in a response ac-
6 tion exceed or are not covered by insurance
7 available to the contractor at the time at which
8 the response action contract is entered into that
9 is likely to provide adequate long-term protec-
10 tion to the public for the potential liability on
11 fair and reasonable terms (including consider-
12 ation of premium, policy terms, and
13 deductibles).

14 “(C) DILIGENT EFFORTS.—The Adminis-
15 trator shall enter into an indemnification agree-
16 ment only if the Administrator determines that
17 the response action contractor has made dili-
18 gent efforts to obtain insurance coverage from
19 non-Federal sources to cover potential liabil-
20 ities.

21 “(D) CONTINUED DILIGENT EFFORTS.—
22 An indemnification agreement shall require the
23 response action contractor to continue, not
24 more frequently than annually, to make diligent

1 efforts to obtain insurance coverage from non-
2 Federal sources to cover potential liabilities.

3 “(E) LIMITATIONS ON INDEMNIFICA-
4 TION.—An indemnification agreement provided
5 under this subsection shall include deductibles
6 and shall place limits on the amount of indem-
7 nification made available in amounts deter-
8 mined by the contracting agency to be appro-
9 priate in light of the unique risk factors associ-
10 ated with the cleanup activity.”.

11 (e) INDEMNIFICATION FOR THREATENED RE-
12 LEASES.—Section 119(c)(5)(A) of the Comprehensive En-
13 vironmental Response, Compensation, and Liability Act of
14 1980 (42 U.S.C. 9619(c)(5)(A)) is amended by inserting
15 “or threatened release” after “release” each place it ap-
16 pears.

17 (f) EXTENSION OF COVERAGE TO ALL RESPONSE
18 ACTIONS.—Section 119(e)(1) of the Comprehensive Envi-
19 ronmental Response, Compensation, and Liability Act of
20 1980 (42 U.S.C. 9619(e)(1)) is amended—

21 (1) in subparagraph (D) by striking “carrying
22 out an agreement under section 106 or 122”; and

23 (2) in the matter following subparagraph (D)—

24 (A) by striking “any remedial action under
25 this Act at a facility listed on the National Pri-

1 orities List, or any removal under this Act,”
2 and inserting “any response action,”; and

3 (B) by inserting before the period at the
4 end the following: “or to undertake appropriate
5 action necessary to protect and restore any nat-
6 ural resource damaged by the release or threat-
7 ened release”.

8 (g) DEFINITION OF RESPONSE ACTION CONTRAC-
9 TOR.—Section 119(e)(2)(A)(i) of the Comprehensive Envi-
10 ronmental Response, Compensation, and Liability Act of
11 1980 (42 U.S.C. 9619(e)(2)(A)(i)) is amended by striking
12 “and is carrying out such contract” and inserting “cov-
13 ered by this section and any person (including any sub-
14 contractor) hired by a response action contractor”.

15 (h) SURETY BONDS.—Section 119 of the Comprehen-
16 sive Environmental Response, Compensation, and Liabil-
17 ity Act of 1980 (42 U.S.C. 9619) is amended—

18 (1) in subsection (e)(2)(C) by striking “, and
19 before January 1, 1996,”; and

20 (2) in subsection (g)(5) by striking “, or after
21 December 31, 1995”.

22 (i) NATIONAL UNIFORM STATUTE OF REPOSE.—Sec-
23 tion 119 of the Comprehensive Environmental Response,
24 Compensation, and Liability Act of 1980 (42 U.S.C.
25 9619) is amended by adding at the end the following:

1 “(h) LIMITATION ON ACTIONS AGAINST RESPONSE

2 ACTION CONTRACTORS.—

3 “(1) IN GENERAL.—No action may be brought
4 as a result of the performance of services under a
5 response contract against a response action contrac-
6 tor after the date that is 7 years after the date of
7 completion of work at any facility under the contract
8 to recover—

9 “(A) injury to property, real or personal;

10 “(B) personal injury or wrongful death;

11 “(C) other expenses or costs arising out of
12 the performance of services under the contract;
13 or

14 “(D) contribution or indemnity for dam-
15 ages sustained as a result of an injury de-
16 scribed in subparagraphs (A) through (C).

17 “(2) EXCEPTION.—Paragraph (1) does not bar
18 recovery for a claim caused by the conduct of the re-
19 sponse action contractor that is grossly negligent or
20 that constitutes intentional misconduct.

21 “(3) INDEMNIFICATION.—This subsection does
22 not affect any right of indemnification that a re-
23 sponse action contractor may have under this section
24 or may acquire by contract with any person.

1 “(i) STATE STANDARDS OF REPOSE.—Subsections
2 (a)(1) and (h) shall not apply in determining the liability
3 of a response action contractor if the State has enacted
4 a statute of repose determining the liability of a response
5 action contractor.”.

6 **SEC. 506. RELEASE OF EVIDENCE.**

7 (a) TIMELY ACCESS TO INFORMATION FURNISHED
8 UNDER SECTION 104(e).—Section 104(e)(7)(A) of the
9 Comprehensive Environmental Response, Compensation,
10 and Liability Act of 1980 (42 U.S.C. 9604(e)(7)(A)) is
11 amended by inserting after “shall be available to the pub-
12 lic” the following: “not later than 14 days after the
13 records, reports, or information is obtained”.

14 (b) REQUIREMENT TO PROVIDE POTENTIALLY RE-
15 SPONSIBLE PARTIES EVIDENCE OF LIABILITY.—

16 (1) ABATEMENT ACTIONS.—Section 106(a) of
17 the Comprehensive Environmental Response, Com-
18 pensation, and Liability Act of 1980 (42 U.S.C.
19 9606(a)) is amended—

20 (A) by striking “(a) In addition” and in-
21 serting the following: “(a) ORDER.—”

22 “(1) IN GENERAL.—In addition”; and

23 (B) by adding at the end the following:

24 “(2) CONTENTS OF ORDER.—An order under
25 paragraph (1) shall provide information concerning

1 the evidence that indicates that each element of li-
2 ability described in section 107(a)(1) (A), (B), (C),
3 and (D), as applicable, is present.”.

4 (2) SETTLEMENTS.—Section 122(e)(1) of the
5 Comprehensive Environmental Response, Compensa-
6 tion, and Liability Act of 1980 (42 U.S.C.
7 9622(e)(1)) is amended by inserting after subpara-
8 graph (C) the following:

9 “(D) For each potentially responsible
10 party, the evidence that indicates that each ele-
11 ment of liability contained in section 107(a)(1)
12 (A), (B), (C), and (D), as applicable, is
13 present.”.

14 **SEC. 507. CONTRIBUTION PROTECTION.**

15 Section 113(f)(2) of the Comprehensive Environ-
16 mental Response, Compensation, and Liability Act of
17 1980 (42 U.S.C. 9613(f)(2)) is amended in the first sen-
18 tence by inserting “or cost recovery” after “contribution”.

19 **SEC. 508. TREATMENT OF RELIGIOUS, CHARITABLE, SCI-**
20 **ENTIFIC, AND EDUCATIONAL ORGANIZA-**
21 **TIONS AS OWNERS OR OPERATORS.**

22 (a) DEFINITION.—Section 101(20) of the Com-
23 prehensive Environmental Response, Compensation, and
24 Liability Act of 1980 (42 U.S.C. 9601(20)) (as amended

1 by section 502(a)) is amended by adding at the end the
2 following:

3 “(I) RELIGIOUS, CHARITABLE, SCIENTIFIC,
4 AND EDUCATIONAL ORGANIZATIONS.—The term
5 ‘owner or operator’ includes an organization de-
6 scribed in section 501(c)(3) of the Internal Rev-
7 enue Code of 1986 that is organized and oper-
8 ated exclusively for religious, charitable, sci-
9 entific, or educational purposes and that holds
10 legal or equitable title to a vessel or facility.”.

11 (b) LIMITATION ON LIABILITY.—Section 107 of the
12 Comprehensive Environmental Response, Compensation,
13 and Liability Act of 1980 (42 U.S.C. 9607) (as amended
14 by section 501(b)) is amended by adding at the end the
15 following:

16 “(u) RELIGIOUS, CHARITABLE, SCIENTIFIC, AND
17 EDUCATIONAL ORGANIZATIONS.—

18 “(1) LIMITATION ON LIABILITY.—Subject to
19 paragraph (2), if an organization described in sec-
20 tion 101(20)(I) holds legal or equitable title to a ves-
21 sel or facility as a result of a charitable gift that is
22 allowable as a deduction under section 170, 2055, or
23 2522 of the Internal Revenue Code of 1986 (deter-
24 mined without regard to dollar limitations), the li-
25 ability of the organization shall be limited to the

1 lesser of the fair market value of the vessel or facil-
2 ity or the actual proceeds of the sale of the vessel
3 or facility received by the organization.

4 “(2) CONDITIONS.—In order for an organiza-
5 tion described in section 101(20)(I) to be eligible for
6 the limited liability described in paragraph (1), the
7 organization shall—

8 “(A) provide full cooperation, assistance,
9 and vessel or facility access to persons author-
10 ized to conduct response actions at the vessel or
11 facility, including the cooperation and access
12 necessary for the installation, preservation of
13 integrity, operation, and maintenance of any
14 complete or partial response action at the vessel
15 or facility;

16 “(B) provide full cooperation and assist-
17 ance to the United States in identifying and lo-
18 cating persons who recently owned, operated, or
19 otherwise controlled activities at the vessel or
20 facility;

21 “(C) establish by a preponderance of the
22 evidence that all active disposal of hazardous
23 substances at the vessel or facility occurred be-
24 fore the organization acquired the vessel or fa-
25 cility; and

1 “(D) establish by a preponderance of the
2 evidence that the organization did not cause or
3 contribute to a release or threatened release of
4 hazardous substances at the vessel or facility.

5 “(3) LIMITATION.—Nothing in this subsection
6 affects the liability of a person other than a person
7 described in section 101(20)(I) that meets the condi-
8 tions specified in paragraph (2).”.

9 **SEC. 509. COMMON CARRIERS.**

10 Section 107(b)(3) of the Comprehensive Environ-
11 mental Response, Compensation, and Liability Act of
12 1980 (42 U.S.C. 9607(b)(3)) is amended by striking “a
13 published tariff and acceptance” and inserting “a con-
14 tract”.

15 **SEC. 510. LIMITATION ON LIABILITY OF RAILROAD OWN-**
16 **ERS.**

17 Section 107 of the Comprehensive Environmental Re-
18 sponse, Compensation, and Liability Act of 1980 (42
19 U.S.C. 9607) (as amended by section 507(b)) is amended
20 by adding at the end the following:

21 “(v) LIMITATION ON LIABILITY OF RAILROAD OWN-
22 ERS.—Notwithstanding subsection (a)(1), a person that
23 does not impede the performance of a response action or
24 natural resource restoration shall not be liable under this
25 Act to the extent that liability is based solely on the status

1 of the person as a railroad owner or operator of a spur
2 track, including a spur track over land subject to an ease-
3 ment, to a facility that is owned or operated by a person
4 that is not affiliated with the railroad owner or operator,
5 if—

6 “(1) the spur track provides access to a main
7 line or branch line track that is owned or operated
8 by the railroad;

9 “(2) the spur track is 10 miles long or less; and

10 “(3) the railroad owner or operator does not
11 cause or contribute to a release or threatened release
12 at the spur track.”.

13 **SEC. 511. LIABILITY OF RECYCLERS.**

14 (a) **DEFINITIONS.**—Section 101 of the Comprehen-
15 sive Environmental Response, Compensation, and Liabil-
16 ity Act of 1980 (42 U.S.C. 9601) (as amended by section
17 501(a)) is amended by adding at the end the following:

18 “(47) **RECYCLABLE MATERIAL.**—The term ‘re-
19 cyclable material’—

20 “(A) means—

21 “(i) scrap glass, paper, plastic, rub-
22 ber, or textile;

23 “(ii) scrap metal; and

24 “(iii) a spent battery; and

1 “(B) includes small amounts of any type of
2 material that is incident to or adherent to ma-
3 terial described in subparagraph (A) as a result
4 of the normal and customary use of the mate-
5 rial prior to the exhaustion of the useful life of
6 the material.

7 “(48) SCRAP METAL.—

8 “(A) IN GENERAL.—The term ‘scrap
9 metal’ means scrap metal (as that term is de-
10 fined by the Administrator for purposes of the
11 Solid Waste Disposal Act (42 U.S.C. 6901 et
12 seq.) in section 261.1(c)(6) of title 40, Code of
13 Federal Regulations, or any successor regula-
14 tion).

15 “(B) EXCLUSIONS.—The term ‘scrap
16 metal’ does not include—

17 “(i) any steel shipping container
18 that—

19 “(I) has (or, when intact, had) a
20 capacity of not less than 30 and not
21 more than 3,000 liters; and

22 “(II) has any hazardous sub-
23 stance contained in or adherent to it
24 (not including any small pieces of
25 metal that may remain after a haz-

1 ardous substance has been removed
2 from the container or any alloy or
3 other material that may be chemically
4 or metallurgically bonded in the steel
5 itself); or

6 “(ii) any material described in sub-
7 paragraph (A) that the Administrator may
8 by regulation exclude from the meaning of
9 the term based on a finding that inclusion
10 of the material within the meaning of the
11 term would result in a threat to human
12 health or the environment.”.

13 (b) LIABILITY OF RECYCLERS.—

14 (1) IN GENERAL.—Section 107 of the Com-
15 prehensive Environmental Response, Compensation,
16 and Liability Act of 1980 (42 U.S.C. 9607) (as
17 amended by section 509) is amended by adding at
18 the end the following:

19 “(w) LIABILITY OF RECYCLERS.—

20 “(1) APPLICABILITY OF SUBSECTION.—Subject
21 to paragraph (10), this subsection shall be applied to
22 determine the liability of any person with respect to
23 response costs at a facility listed on the National
24 Priorities List incurred after the date of enactment
25 of this subsection.

1 “(2) RELIEF FROM LIABILITY.—Except as pro-
2 vided in paragraph (6), a person that arranges for
3 the recycling of recyclable material shall not be liable
4 for response costs under subsection (a)(1) (C) or
5 (D).

6 “(3) SCRAP GLASS, PAPER, PLASTIC, RUBBER,
7 OR TEXTILE.—For the purposes of paragraph (2), a
8 person shall be considered to arrange for the recy-
9 cling of scrap glass, paper, plastic, rubber, or textile
10 if the person sells or otherwise arranges for the recy-
11 cling of the recyclable material in a transaction in
12 which, at the time of the transaction—

13 “(A) the recyclable material meets a com-
14 mercial specification;

15 “(B) a market exists for the recyclable ma-
16 terial;

17 “(C) a substantial portion of the recyclable
18 material is made available for use as a feed-
19 stock for the manufacture of a new saleable
20 product; and

21 “(D)(i) the recyclable material is a replace-
22 ment or substitute for a virgin raw material; or

23 “(ii) the product to be made from the recy-
24 clable material is a replacement or substitute

1 for a product made, in whole or in part, from
2 a virgin raw material.

3 “(4) SCRAP METAL.—For the purposes of para-
4 graph (2), a person shall be considered to arrange
5 for the recycling of scrap metal if the person sells
6 or otherwise arranges for the recycling of the scrap
7 metal in a transaction in which, at the time of the
8 transaction—

9 “(A) the conditions stated in subpara-
10 graphs (A) through (D) of paragraph (3) are
11 met; and

12 “(B) in the case of a transaction that oc-
13 curs after the effective date of a standard, es-
14 tablished by the Administrator by regulation
15 under the Solid Waste Disposal Act (42 U.S.C.
16 6901 et seq.), regarding the storage, transport,
17 management, or other activity associated with
18 the recycling of scrap metal, the person is in
19 compliance with the standard.

20 “(5) SPENT BATTERIES.—

21 “(A) IN GENERAL.—For the purposes of
22 paragraph (1), a person shall be considered to
23 arrange for the recycling of a spent lead-acid
24 battery, nickel-cadmium battery, or other bat-
25 tery if the person sells or otherwise arranges for

1 the recycling of the battery in a transaction in
2 which, at the time of the transaction—

3 “(i) the conditions stated in subpara-
4 graphs (A) through (D) of paragraph (3)
5 are met;

6 “(ii) the person does not reclaim the
7 valuable components of the battery; and

8 “(iii) in the case of a transaction that
9 occurs after the effective date of a stand-
10 ard, established by the Administrator by
11 regulation under authority of the Solid
12 Waste Disposal Act (42 U.S.C. 6901 et
13 seq.) or the Mercury-Containing and Re-
14 chargeable Battery Management Act), re-
15 garding the storage, transport, manage-
16 ment, or other activity associated with the
17 recycling of batteries, the person is in com-
18 pliance with the standard.

19 “(B) TOLLING ARRANGEMENTS.—A person
20 that, by contract, arranges for reclamation and
21 smelting of a battery by a third party not a
22 party to a transaction under subparagraph (A)
23 and receives from the third party material re-
24 claimed from the battery shall not, by reason of
25 the receipt of the reclaimed material, be consid-

1 ered to reclaim the valuable components of the
2 battery for purposes of subparagraph (A)(ii).

3 “(6) GROUNDS FOR ESTABLISHING LIABIL-
4 ITY.—

5 “(A) IN GENERAL.—A person that ar-
6 ranges for the recycling of recyclable material
7 that would be liable under subsection (a)(1) (C)
8 or (D) but for paragraph (2) shall be liable not-
9 withstanding that paragraph if—

10 “(i) the person has an objectively rea-
11 sonable basis to believe at the time of the
12 recycling transaction that—

13 “(I) the recyclable material will
14 not be recycled;

15 “(II) the recyclable material will
16 be burned as fuel, for energy recovery
17 or incineration;

18 “(III) the consuming facility is
19 not in compliance with a substantive
20 provision (including a requirement to
21 obtain a permit for handling, process-
22 ing, reclamation, or other manage-
23 ment activity associated with recycla-
24 ble material) of any Federal, State, or
25 local environmental law (including a

1 regulation), or a compliance order or
2 decree issued under such a law, appli-
3 cable to the handling, processing, rec-
4 lamation, or other management activ-
5 ity associated with the recyclable ma-
6 terial; or

7 “(IV) a hazardous substance has
8 been added to the recyclable material
9 for purposes other than processing for
10 recycling;

11 “(ii) the person fails to exercise rea-
12 sonable care with respect to the manage-
13 ment or handling of the recyclable material
14 (for which purpose a failure to adhere to
15 customary industry practices current at
16 the time of the recycling transaction de-
17 signed to minimize, through source control,
18 contamination of the recyclable material by
19 hazardous substances shall be considered
20 to be a failure to exercise reasonable care);
21 or

22 “(iii) any item of the recyclable mate-
23 rial contains—

24 “(I) polychlorinated biphenyls at
25 a concentration in excess of 50 parts

1 per million (or any different con-
2 centration specified in any applicable
3 standard that may be issued under
4 other Federal law after the date of en-
5 actment of this subsection); or

6 “(II) in the case of a transaction
7 involving scrap paper, any concentra-
8 tion of a hazardous substance that the
9 Administrator determines by regula-
10 tion, issued after the date of enact-
11 ment of this subsection and before the
12 date of the transaction, to be likely to
13 cause significant risk to human health
14 or the environment as a result of its
15 inclusion in the paper recycling proc-
16 ess.

17 “(B) OBJECTIVELY REASONABLE BASIS
18 FOR BELIEF.—Whether a person has an objec-
19 tively reasonable basis for belief described in
20 subparagraph (A)(i) shall be determined using
21 criteria that include—

22 “(i) the size of the person’s business;

23 “(ii) customary industry practices (in-
24 cluding practices designed to minimize,
25 through source control, contamination of

1 recyclable material by hazardous sub-
2 stances);

3 “(iii) the price paid or received in the
4 recycling transaction; and

5 “(iv) the ability of the person to de-
6 tect the nature of the consuming facility’s
7 operations concerning handling, processing,
8 or reclamation of the recyclable material or
9 other management activities associated
10 with the recyclable material.

11 “(7) REGULATIONS.—The Administrator may
12 issue a regulation that clarifies the meaning of any
13 term used in this subsection or by any other means
14 makes clear the application of this subsection to any
15 person.

16 “(8) LIABILITY FOR ATTORNEY’S FEES FOR
17 CERTAIN ACTIONS.—A person that, after the date of
18 enactment of this subsection, commences a civil ac-
19 tion in contribution against a person that is not lia-
20 ble by operation of this subsection shall be liable to
21 that person for all reasonable costs of defending the
22 action, including all reasonable attorney’s fees and
23 expert witness fees.

1 “(9) RELATIONSHIP TO LIABILITY UNDER
2 OTHER LAWS.—Nothing in this subsection shall af-
3 fect—

4 “(A) liability under any other Federal,
5 State, or local law (including a regulation); or

6 “(B) the authority of the Administrator to
7 issue regulations under the Solid Waste Dis-
8 posal Act (42 U.S.C. 6901 et seq.) or any other
9 law.

10 “(C) EFFECT ON NONRECYCLERS.—

11 “(i) COSTS BORNE BY THE UNITED
12 STATES.—All costs attributable to a recy-
13 cling transaction that, absent this sub-
14 section, would be borne by a person that is
15 relieved of liability (in whole or in part) by
16 this subsection shall be borne by the Unit-
17 ed States, to the extent that the person is
18 relieved of liability.

19 “(ii) NO RECOVERY FROM THE UNIT-
20 ED STATES.—Notwithstanding clause (i),
21 no person shall be entitled to recover any
22 sums paid to the United States prior to
23 the date of enactment of this subsection in
24 satisfaction of any liability attributable to
25 a recycling transaction.

1 “(D) CONTRIBUTION AMONG PARTIES TO
2 RECYCLING TRANSACTIONS.—Notwithstanding
3 the other provisions of this subsection, a person
4 that incurred response costs for a response ac-
5 tion taken prior to the date of enactment of this
6 subsection, may bring a civil action for con-
7 tribution for the costs against—

8 “(i) any person that is liable under
9 section 107(a)(1) (A) or (B); or

10 “(ii) any person that, before the date
11 of enactment of this subsection—

12 “(I) received and failed to comply
13 with an administrative order issued
14 under section 104 or 106; or

15 “(II) received and did not accept
16 a written offer from the United States
17 to enter into a consent decree or ad-
18 ministrative order.”.

19 (10) EFFECTIVE DATE AND TRANSITION
20 RULES.—The amendments made by this sub-
21 section—

22 (1) shall take effect with respect to an action
23 under section 106, 107, or 113 of the Comprehen-
24 sive Environmental Response, Compensation, and
25 Liability Act of 1980 (42 U.S.C. 9606, 9607, 9613)

1 that becomes final on or after the date of enactment
2 of this Act; but

3 (2) shall not apply to an action brought by any
4 person under section 107 or 113 of that Act (42
5 U.S.C. 9607 and 9613) for costs or damages in-
6 curred by the person before the date of enactment
7 of this Act.

8 **TITLE VI—FEDERAL FACILITIES**

9 **SEC. 601. TRANSFER OF AUTHORITIES.**

10 Section 120 of the Comprehensive Environmental Re-
11 sponse, Compensation, and Liability Act of 1980 (42
12 U.S.C. 9620) is amended by striking subsection (g) and
13 inserting the following:

14 “(g) TRANSFER OF AUTHORITIES.—

15 “(1) DEFINITIONS.—In this section:

16 “(A) INTERAGENCY AGREEMENT.—The
17 term ‘interagency agreement’ means an inter-
18 agency agreement under this section.

19 “(B) TRANSFER AGREEMENT.—The term
20 ‘transfer agreement’ means a transfer agree-
21 ment under paragraph (3).

22 “(C) TRANSFEREE STATE.—The term
23 ‘transferee State’ means a State to which au-
24 thorities have been transferred under a transfer
25 agreement.

1 “(2) STATE APPLICATION FOR TRANSFER OF
2 FEDERAL AUTHORITIES.—A State may apply to the
3 Administrator to exercise the authorities vested in
4 the Administrator under this Act at any facility lo-
5 cated in the State that is—

6 “(A) owned or operated by any depart-
7 ment, agency, or instrumentality of the United
8 States (including the executive, legislative, and
9 judicial branches of government); and

10 “(B) listed on the National Priorities List.

11 “(3) TRANSFER OF AUTHORITIES.—

12 “(A) DETERMINATIONS.—The Adminis-
13 trator shall enter into a transfer agreement to
14 transfer to a State the authorities described in
15 paragraph (2) if the Administrator determines
16 that—

17 “(i) the State has adequate financial
18 and personnel resources, organization, and
19 expertise to implement, administer, and en-
20 force a hazardous substance response
21 program;

22 “(ii) the State will implement the
23 transferred authorities in a manner that is
24 protective of human health and the
25 environment;

1 “(iii) the State has agreed to be
2 bound by all Federal requirements and
3 standards under section 133; and

4 “(iv) the State has agreed to abide by
5 the terms of any interagency agreement or
6 agreements covering the Federal facility or
7 facilities with respect to which authorities
8 are being transferred in effect at the time
9 of the transfer of authorities.

10 “(B) CONTENTS OF TRANSFER AGREE-
11 MENT.—A transfer agreement—

12 “(i) shall incorporate the determina-
13 tions of the Administrator under subpara-
14 graph (A); and

15 “(ii) in the case of a transfer agree-
16 ment covering a facility with respect to
17 which there is no interagency agreement
18 that specifies a dispute resolution process,
19 shall require that within 120 days after the
20 effective date of the transfer agreement,
21 the State shall agree with the head of the
22 Federal department, agency, or instrumen-
23 tality that owns or operates the facility on
24 a process for resolution of any disputes be-
25 tween the State and the Federal depart-

1 ment, agency, or instrumentality regarding
2 the selection of a remedial action for the
3 facility; and

4 “(iii) shall not impose on the trans-
5 feree State any term or condition other
6 than that the State meet the requirements
7 of subparagraph (A).

8 “(4) EFFECT OF TRANSFER.—

9 “(A) STATE AUTHORITIES.—A transferee
10 State—

11 “(i) shall not be deemed to be an
12 agent of the Administrator but shall exer-
13 cise the authorities transferred under a
14 transfer agreement in the name of the
15 State; and

16 “(ii) shall have exclusive authority to
17 exercise authorities that have been
18 transferred.

19 “(B) EXCEPTIONS.—The President may
20 bring an administrative or judicial enforcement
21 action with respect to a Federal facility under
22 this Act if—

23 “(i) the State requests that the Presi-
24 dent provide assistance in the performance

1 of a response action and that the enforce-
2 ment bar in subparagraph (A) be lifted; or

3 “(ii) after providing the Governor of
4 the State notice and a reasonable oppor-
5 tunity to cure, the Administrator—

6 “(I) makes a determination that
7 the State is unwilling or unable to
8 take appropriate action at a facility at
9 which there is an imminent threat of
10 actual exposure of a hazardous sub-
11 stance to humans or the environment;
12 and

13 “(II) obtains a declaratory judg-
14 ment in United States district court
15 that the State has failed to make rea-
16 sonable progress in performance of a
17 remedial action at the facility.

18 “(C) EFFECT ON INTERAGENCY AGREE-
19 MENTS.—Nothing in this subsection shall re-
20 quire, authorize, or permit the modification or
21 revision of an interagency agreement covering a
22 facility with respect to which authorities have
23 been transferred to a State under a transfer
24 agreement (except for the substitution of the
25 transferee State for the Administrator in the

1 terms of the interagency agreement, including
2 terms stating obligations intended to preserve
3 the confidentiality of information) without the
4 written consent of the Governor of the State
5 and the head of the department, agency, or in-
6 strumentality.

7 “(5) SELECTED REMEDIAL ACTION.—The reme-
8 dial action selected for a facility under section 121
9 by a transferee State shall constitute the only reme-
10 dial action required to be conducted at the facility,
11 and the transferee State shall be precluded from en-
12 forcing any other remedial action requirement under
13 Federal or State law, except for any corrective ac-
14 tion under the Solid Waste Disposal Act (42 U.S.C.
15 6901 et seq.) that was initiated prior to the date of
16 enactment of this subsection.

17 “(6) APPROVAL OF APPLICATION.—

18 “(A) IN GENERAL.—Not later than 120
19 days after receiving an application from a State
20 (unless the State agrees to a greater length of
21 time for the Administrator to make a deter-
22 mination), the Administrator shall—

23 “(i) issue a notice of approval of the
24 application (including approval or dis-
25 approval regarding any or all of the facili-

1 ties with respect to which a delegation of
2 authority is requested); or

3 “(ii) if the Administrator determines
4 that the State does not meet one or more
5 of the criteria enumerated in paragraph
6 (3)(A), issue a notice of disapproval, in-
7 cluding an explanation of the basis for the
8 determination.

9 “(B) FAILURE TO ACT.—If the Adminis-
10 trator does not issue a notice of approval or no-
11 tice of disapproval of all or any portion of an
12 application within the applicable time period
13 under subparagraph (A), the application shall
14 be deemed to have been granted.

15 “(C) RESUBMISSION OF APPLICATION.—

16 “(i) IN GENERAL.—If the Adminis-
17 trator disapproves an application under
18 paragraph (2), the State may resubmit the
19 application at any time after receiving the
20 notice of disapproval.

21 “(ii) FAILURE TO ACT.—If the Ad-
22 ministrator does not issue a notice of ap-
23 proval or notice of disapproval of a resub-
24 mitted application within the applicable
25 time period under subparagraph (A), the

1 resubmitted application shall be deemed to
2 have been granted.

3 “(7) JUDICIAL REVIEW.—The State (but no
4 other person) shall be entitled to judicial review
5 under section 113(b) of a disapproval of a resubmit-
6 ted application.

7 “(8) WITHDRAWAL OF AUTHORITIES.—The Ad-
8 ministrator may withdraw the authorities trans-
9 ferred under a transfer agreement in whole or in
10 part if the Administrator determines that the
11 State—

12 “(A) is exercising the authorities, in whole
13 or in part, in a manner that is inconsistent with
14 the requirements of this Act;

15 “(B) has violated the transfer agreement,
16 in whole or in part; or

17 “(C) no longer meets one of the require-
18 ments of paragraph (3).

19 “(9) DISPUTE RESOLUTION AND ENFORCE-
20 MENT.—

21 “(A) DISPUTE RESOLUTION.—

22 “(i) FACILITIES COVERED BY BOTH A
23 TRANSFER AGREEMENT AND AN INTER-
24 AGENCY AGREEMENTS.—In the case of a
25 facility with respect to which there is both

1 a transfer agreement and an interagency
2 agreement, if the State does not concur in
3 the remedial action proposed for selection
4 by the Federal department, agency, or in-
5 strumentality, the Federal department,
6 agency, or instrumentality and the State
7 shall engage in the dispute resolution proc-
8 ess provided for in the interagency agree-
9 ment, except that the final level for resolu-
10 tion of the dispute shall be the head of the
11 Federal department, agency, or instrumen-
12 tality and the Governor of the State.

13 “(ii) FACILITIES COVERED BY A
14 TRANSFER AGREEMENT BUT NOT AN
15 INTERAGENCY AGREEMENT.—In the case
16 of a facility with respect to which there is
17 a transfer agreement but no interagency
18 agreement, if the State does not concur in
19 the remedial action proposed for selection
20 by the Federal department, agency, or in-
21 strumentality, the Federal department,
22 agency, or instrumentality and the State
23 shall engage in dispute resolution as pro-
24 vided in paragraph (3)(B)(ii) under which
25 the final level for resolution of the dispute

1 shall be the head of the Federal depart-
2 ment, agency, or instrumentality and the
3 Governor of the State.

4 “(iii) FAILURE TO RESOLVE.—If no
5 agreement is reached between the head of
6 the Federal department, agency, or instru-
7 mentality and the Governor in a dispute
8 resolution process under clause (i) or
9 (ii), the Governor of the State shall make
10 the final determination regarding selection
11 of a remedial action. To compel implemen-
12 tation of the State’s selected remedy, the
13 State must bring a civil action in United
14 States district court.

15 “(B) ENFORCEMENT.—

16 “(i) AUTHORITY; JURISDICTION.—An
17 interagency agreement with respect to
18 which there is a transfer agreement or an
19 order issued by a transferee State shall be
20 enforceable by a transferee State or by the
21 Federal department, agency, or instrumen-
22 tality that is a party to the interagency
23 agreement only in the United States dis-
24 trict court for the district in which the fa-
25 cility is located.

1 “(ii) TIMING.—In the case of a facil-
2 ity with respect to a remedy is eligible for
3 review by a remedy review board under
4 section 134(e), an action for enforcement
5 under this paragraph may not be brought
6 until the remedy review board submits its
7 recommendation to the Administrator.

8 “(iii) REMEDIES.—The district court
9 shall—

10 “(I) enforce compliance with any
11 provision, standard, regulation, condi-
12 tion, requirement, order, or final de-
13 termination that has become effective
14 under the interagency agreement;

15 “(II) impose any appropriate civil
16 penalty provided for any violation of
17 an interagency agreement, not to ex-
18 ceed \$25,000 per day;

19 “(III) compel implementation of
20 the selected remedial action; and

21 “(IV) review a challenge by the
22 Federal department, agency, or in-
23 strumentality to the remedial action
24 selected by the State under this sec-

1 tion, in accordance with section
2 113(j).”.

3 **SEC. 602. LIMITATION ON CRIMINAL LIABILITY OF FED-**
4 **ERAL OFFICERS, EMPLOYEES, AND AGENTS.**

5 Section 120 of the Comprehensive Environmental Re-
6 sponse, Compensation, and Liability Act of 1980 (42
7 U.S.C. 9620) is amended by adding at the end the
8 following:

9 “(k) CRIMINAL LIABILITY.—Notwithstanding any
10 other provision of this Act or any other law, an officer,
11 employee, or agent of the United States shall not be held
12 criminally liable for a failure to comply, in any fiscal year,
13 with a requirement to take a response action at a facility
14 that is owned or operated by a department, agency, or in-
15 strumentality of the United States, under this Act, the
16 Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), or any
17 other Federal or State law unless—

18 “(1) the officer, employee, or agent has not
19 fully performed any direct responsibility or delegated
20 responsibility that the officer, employee, or agent
21 had under Executive Order 12088 (42 U.S.C. 4321
22 note) or any other delegation of authority to ensure
23 that a request for funds sufficient to take the re-
24 sponse action was included in the President’s budget

1 request under section 1105 of title 31, United States
2 Code, for that fiscal year; or

3 “(2) appropriated funds were available to pay
4 for the response action.”.

5 **SEC. 603. INNOVATIVE TECHNOLOGIES FOR REMEDIAL**
6 **ACTION AT FEDERAL FACILITIES.**

7 (a) IN GENERAL.—Section 311 of the Comprehensive
8 Environmental Response, Compensation, and Liability Act
9 of 1980 (42 U.S.C. 9660) is amended by adding at the
10 end the following:

11 “(h) FEDERAL FACILITIES.—

12 “(1) DESIGNATION.—The President may des-
13 ignate a facility that is owned or operated by any de-
14 partment, agency, or instrumentality of the United
15 States, and that is listed or proposed for listing on
16 the National Priorities List, to facilitate the re-
17 search, development, and application of innovative
18 technologies for remedial action at the facility.

19 “(2) USE OF FACILITIES.—

20 “(A) IN GENERAL.—A facility designated
21 under paragraph (1) shall be made available to
22 Federal departments and agencies, State de-
23 partments and agencies, and public and private
24 instrumentalities, to carry out activities de-
25 scribed in paragraph (1).

1 “(B) COORDINATION.—The Adminis-
2 trator—

3 “(i) shall coordinate the use of the fa-
4 cilities with the departments, agencies, and
5 instrumentalities of the United States; and

6 “(ii) may approve or deny the use of
7 a particular innovative technology for re-
8 medial action at any such facility.

9 “(3) CONSIDERATIONS.—

10 “(A) EVALUATION OF SCHEDULES AND
11 PENALTIES.—In considering whether to permit
12 the application of a particular innovative tech-
13 nology for remedial action at a facility des-
14 ignated under paragraph (1), the Administrator
15 shall evaluate the schedules and penalties appli-
16 cable to the facility under any agreement or
17 order entered into under section 120.

18 “(B) AMENDMENT OF AGREEMENT OR
19 ORDER.—If, after an evaluation under subpara-
20 graph (A), the Administrator determines that
21 there is a need to amend any agreement or
22 order entered into pursuant to section 120, the
23 Administrator shall comply with all provisions
24 of the agreement or order, respectively, relating
25 to the amendment of the agreement or order.”.

1 (b) REPORT TO CONGRESS.—Section 311(e) of Com-
2 prehensive Environmental Response, Compensation, and
3 Liability Act of 1980 (42 U.S.C. 9660(e)) is amended—

4 (1) by striking “At the time” and inserting the
5 following:

6 “(1) IN GENERAL.—At the time”; and

7 (2) by adding at the end the following:

8 “(2) ADDITIONAL INFORMATION.—A report
9 under paragraph (1) shall include information on the
10 use of facilities described in subsection (h)(1) for the
11 research, development, and application of innovative
12 technologies for remedial activity, as authorized
13 under subsection (h).”.

14 **TITLE VII—NATURAL RESOURCE** 15 **DAMAGES**

16 **SEC. 701. RESTORATION OF NATURAL RESOURCES.**

17 Section 107(f)(1) of the Comprehensive Environ-
18 mental Response, Compensation, and Liability Act of
19 1980 (42 U.S.C. 9607(f)(1)) is amended—

20 (1) by striking “(1) In the case” and inserting
21 the following:

22 “(f) NATURAL RESOURCE DAMAGES.—

23 “(1) LIABILITY TO THE UNITED STATES OR A
24 STATE.—

25 “(A) IN GENERAL.—In the case”;

1 (2) by striking “alienation: Provided, however,
2 that no liability “and inserting the following: “alien-
3 ation.

4 “(B) COMMITMENT OF NATURAL RE-
5 SOURCES IN ENVIRONMENTAL IMPACT STATE-
6 MENT.—No liability”;

7 (3) by striking “The President” and inserting
8 the following:

9 “(C) ACTION AS TRUSTEE.—The Presi-
10 dent”;

11 (4) by striking “Sums recovered by the United
12 States Government” and inserting the following:

13 “(D) USE OF RECOVERED SUMS.—

14 “(i) RECOVERY BY THE UNITED
15 STATES.—Sums recovered by the United
16 States”;

17 (5) by striking “Sums recovered by a State”
18 and inserting the following:

19 “(ii) RECOVERY BY A STATE.—Sums
20 recovered by a State”;

21 (6) by inserting after “by the State.” the fol-
22 lowing:

23 “(iii) RECOVERY BY AN INDIAN
24 TRIBE.—Sums recovered by an Indian
25 tribe as trustee under this subsection shall

1 be available for use only for restoration, re-
2 placement, or acquisition of the equivalent
3 of an injured, destroyed, or lost natural re-
4 source by the Indian tribe.”; and

5 (7) by striking “The measure of damages in
6 any action” and all that follows through the end of
7 the paragraph and inserting the following:

8 “(E) LIMITATIONS ON LIABILITY.—

9 “(i) MEASURE OF DAMAGES.—The
10 measure of damages in any action for dam-
11 ages for injury to, destruction of, or loss of
12 a natural resource shall be limited to—

13 “(I) the costs of restoration, re-
14 placement, or acquisition of the equiv-
15 alent of a natural resource that suf-
16 fers injury, destruction, or loss caused
17 by a release (including the costs of
18 providing temporary replacement of
19 the services provided by the injured,
20 destroyed, or lost natural resource);
21 and

22 “(II) the reasonable costs of as-
23 sessing damages.

1 “(ii) NONUSE VALUES.—There shall
2 be no recovery under this Act for any im-
3 pairment of nonuse values.

4 “(iii) NO DOUBLE RECOVERY.—A per-
5 son that obtains a recovery of damages, re-
6 sponse costs, assessment costs, or any
7 other costs under this Act for the costs of
8 restoring an injury to or destruction or
9 loss of a natural resource (including injury
10 assessment costs) shall not be entitled to
11 recovery under this Act or any other Fed-
12 eral or State law for the same injury to or
13 destruction or loss of the natural resource.

14 “(iv) RESTRICTIONS ON RECOVERY.—

15 “(I) LIMITATION ON LOST USE
16 DAMAGES.—There shall be no recov-
17 ery from any person under this sec-
18 tion for the value of the lost use pro-
19 vided by a natural resource that oc-
20 curred before December 11, 1980.

21 “(II) RESTORATION, REPLACE-
22 MENT, OR ACQUISITION.—There shall
23 be no recovery from any person under
24 this section for the costs of restora-
25 tion, replacement, or acquisition of

1 the equivalent of an injured, de-
2 stroyed, or lost natural resource if the
3 natural resource injury, destruction,
4 or loss for which the restoration, re-
5 placement, or acquisition is sought
6 and the release of the hazardous sub-
7 stance from which the injury resulted
8 occurred wholly before December 11,
9 1980.

10 “(III) RESTORATION, REPLACE-
11 MENT, OR ACQUISITION.—There shall
12 be no recovery from any person under
13 this section for the costs of restora-
14 tion, replacement, or acquisition of
15 the equivalent of an injured, de-
16 stroyed, or lost natural resource if the
17 natural resource has returned to the
18 baseline condition before the earlier
19 of—

20 “(aa) the filing of a claim
21 for natural resource damages; or

22 “(bb) the incurrence of as-
23 sessment or restoration costs by
24 a trustee.”.

1 **SEC. 702. ASSESSMENT OF INJURY TO AND RESTORATION**
2 **OF NATURAL RESOURCES.**

3 (a) NATURAL RESOURCE INJURY AND RESTORATION
4 ASSESSMENTS.—Section 107(f)(2) of the Comprehensive
5 Environmental Response, Compensation, and Liability Act
6 of 1980 (42 U.S.C. 9607(f)(2)) is amended by striking
7 subparagraph (C) and inserting the following:

8 “(C) NATURAL RESOURCE INJURY AND
9 RESTORATION ASSESSMENT.—

10 “(i) REGULATION.—A natural re-
11 source injury and restoration assessment
12 conducted for the purposes of this Act
13 made by a Federal, State, or tribal trustee
14 shall be performed, to the extent prac-
15 ticable, in accordance with—

16 “(I) the regulation issued under
17 section 301(c); and

18 “(II) scientifically valid principles
19 to ensure the validity and reliability of
20 assessment results.

21 “(ii) FACILITY-SPECIFIC CONDI-
22 TIONS.—Injury assessment, restoration
23 planning, and quantification of restoration
24 costs shall, to the extent practicable, be
25 based on facility-specific information.

1 “(iii) RECOVERABLE COSTS.—A trust-
2 ee’s claim for assessment costs—

3 “(I) may include only—

4 “(aa) costs that arise from
5 work performed for the purpose
6 of assessing injury to a natural
7 resource to support a claim for
8 restoration of the natural re-
9 source; and

10 “(bb) costs that arise from
11 developing and evaluating a rea-
12 sonable range of alternative res-
13 toration measures; but

14 “(II) may not include the costs of
15 conducting any type of study relying
16 on the use of contingent valuation
17 methodology.

18 “(iv) PAYMENT PERIOD.—In entering
19 into an agreement regarding the payment
20 of damages to natural resources under this
21 section, a trustee may permit payment over
22 a period of time that is appropriate in view
23 of the amount of the damages, the finan-
24 cial ability of the responsible party to pay
25 the damages, and the time period over

1 which and the pace at which expenditures
2 are expected to be made for restoration, re-
3 placement, and acquisition activities.

4 “(v) TRUSTEE RESTORATION
5 PLANS.—

6 “(I) ADMINISTRATIVE RECORD.—
7 Participating natural resource trust-
8 ees may designate a lead administra-
9 tive trustee or trustees. The lead ad-
10 ministrative trustee may establish an
11 administrative record on which the
12 trustees will base the selection of a
13 plan for restoration of a natural re-
14 source. The restoration plan shall in-
15 clude a determination of the nature
16 and extent of the natural resource in-
17 jury. The administrative record shall
18 be made available to the public at or
19 near the facility at which the release
20 occurred.

21 “(II) PUBLIC PARTICIPATION.—
22 The President shall issue a regulation
23 for the participation of interested per-
24 sons, including potentially responsible
25 parties, in the development of the ad-

1 ministrative record on which the
2 trustees will base selection of a res-
3 toration plan. The procedures for par-
4 ticipation shall include, at a mini-
5 mum, each of the requirements stated
6 in section 113(k)(2)(B).”.

7 (b) REGULATIONS.—Section 301 of the Comprehen-
8 sive Environmental Response, Compensation, and Liabil-
9 ity Act of 1980 (42 U.S.C. 9651) is amended by striking
10 subsection (c) and inserting the following:

11 “(c) REGULATIONS FOR INJURY AND RESTORATION
12 ASSESSMENTS.—

13 “(1) IN GENERAL.—The President, acting
14 through Federal officials designated by the National
15 Contingency Plan under section 107(f)(2), shall
16 issue a regulation for the assessment of injury to
17 natural resources and the costs of restoration of nat-
18 ural resources (including the costs of assessment)
19 for the purposes of this Act.

20 “(2) CONTENTS.—The regulation under para-
21 graph (1) shall—

22 “(A) specify protocols for conducting as-
23 sessments in individual cases to determine the
24 injury, destruction, or loss of natural resources;

1 “(B) identify the best available procedures
2 to determine the costs of restoration and ensure
3 that assessment costs are reasonable.

4 “(C) take into consideration the ability of
5 a natural resource to recover naturally and the
6 availability of replacement or alternative re-
7 sources;

8 “(D) provide for the designation of a lead
9 Federal administrative trustee for each facility
10 at which an injury to natural resources has oc-
11 curred within 180 days after the date of first
12 notice to the responsible parties that an assess-
13 ment of injury and restoration alternatives will
14 be made; and

15 “(E) set forth procedures under which—

16 “(i) all pending and potential trustees
17 identify the injured natural resources with-
18 in their respective trust responsibilities,
19 and the authority under which such re-
20 sponsibilities are established, as soon as
21 practicable after the date on which an as-
22 sessment begins;

23 “(ii) assessment of injury and restora-
24 tion alternatives will be coordinated to the
25 greatest extent practicable between the

1 lead Federal administrative trustee and
2 any present or potential State or tribal
3 trustees, as applicable; and

4 “(iii) time periods for payment of
5 damages in accordance with section
6 107(f)(2)(C)(iv) shall be determined.

7 “(3) DEADLINE FOR ISSUANCE OF REGULA-
8 TION; PERIODIC REVIEW.—The regulation under
9 paragraph (1) shall be issued not later than 2 years
10 after the date of enactment of the Superfund Clean-
11 up Acceleration Act of 1997 and shall be reviewed
12 and revised as appropriate every 5 years.”.

13 **SEC. 703. CONSISTENCY BETWEEN RESPONSE ACTIONS**
14 **AND RESOURCE RESTORATION STANDARDS.**

15 (a) RESTORATION STANDARDS AND ALTER-
16 NATIVES.—Section 107(f) of the Comprehensive Environ-
17 mental Response, Compensation, and Liability Act of
18 1980 (42 U.S.C. 9607(f)) is amended by adding at the
19 end the following:

20 “(3) RESTORATION ALTERNATIVES.—

21 “(A) GOAL.—The goal of any restoration
22 shall be to restore an injured, destroyed, or lost
23 natural resource to the condition that the natu-
24 ral resource would have been in but for the re-
25 lease of a hazardous substance.

1 “(B) SELECTION OF ALTERNATIVES.—Any
2 Federal natural resource trustee, State natural
3 resource trustee, or Indian tribe selecting a res-
4 toration alternative to attain the goal of this
5 paragraph shall select measures that are—

6 “(i) technically feasible;

7 “(ii) in compliance with applicable
8 law;

9 “(iii) consistent with the requirements
10 of this Act and the National Contingency
11 Plan;

12 “(iv) cost-effective; and

13 “(v) timely, to the extent consistent
14 with clauses (i) through (iv).

15 “(C) DEVELOPMENT OF ALTERNATIVES.—
16 Before selecting a restoration plan, a trustee
17 shall develop a reasonable range of alternatives
18 including an alternative that relies on natural
19 recovery.

20 “(D) RELATIONSHIP TO RESPONSE AC-
21 TION.—A Federal natural resource trustee,
22 State natural resource trustee, or Indian tribe
23 natural resource trustee selecting a restoration
24 alternative shall take into account what any re-
25 moval or remedial action carried out or planned

1 for the facility under this Act or any other Fed-
2 eral or State law has accomplished or will ac-
3 complish to attain the goal of this paragraph.
4 Before implementing the selected restoration al-
5 ternative, the trustee shall provide the Adminis-
6 trator a statement that the planned restoration
7 alternative is, to the extent practicable, consist-
8 ent with any response action planned or accom-
9 plished at the facility, and include an expla-
10 nation of any significant inconsistencies be-
11 tween a response action and the selected res-
12 toration alternative.

13 “(E) TEMPORARY REPLACEMENT.—A res-
14 toration alternative selected in accordance with
15 subparagraph (B) may include temporary re-
16 placement of the lost services provided by the
17 injured, destroyed, or lost natural resource.

18 (b) CONSIDERATION OF NATURAL RESOURCES IN
19 RESPONSE ACTIONS.—Section 121(a) of the Comprehen-
20 sive Environmental Response, Compensation, and Liabil-
21 ity Act of 1980 (42 U.S.C. 9621(a)) (as amended by sec-
22 tion 402(1)) is amended by adding at the end the follow-
23 ing:

24 “(6) COORDINATION.—In evaluating and select-
25 ing remedial actions, the President shall take into

1 account the potential for injury to a natural resource
2 resulting from such actions.”.

3 **SEC. 704. CONTRIBUTION.**

4 Subparagraph (A) of section 113(f)(1) of the Com-
5 prehensive Environmental Response, Compensation, and
6 Liability Act of 1980 (42 U.S.C. 9613(f)(1)) is amended
7 in the third sentence by inserting “and natural resource
8 damages” after “costs”.

9 **SEC. 705. PERIOD IN WHICH ACTION FOR DAMAGES MAY BE**
10 **BROUGHT.**

11 Section 113(g)(1) of the Comprehensive Environ-
12 mental Response, Compensation, and Liability Act of
13 1980 (42 U.S.C. 9613(g)(1)) is amended by adding at the
14 end the following: “With respect to a facility for which
15 the trustees and the potentially responsible parties, after
16 the date of enactment of the Superfund Cleanup Accelera-
17 tion Act of 1997, have entered into a cooperative agree-
18 ment governing the conduct and scope of a natural re-
19 source damage assessment and allocating the costs of the
20 assessment, an action for damages under this Act shall
21 be commenced within the earlier of 6 years after the date
22 of signing of the cooperative agreement, or 3 years after
23 the completion of the damage assessment, in lieu of the
24 period otherwise provided or the dates otherwise referred
25 to in this paragraph.”.

1 **SEC. 706. MEDIATION.**

2 Section 136 of the Comprehensive Environmental Re-
3 sponse, Compensation, and Liability Act of 1980 (as
4 added by section 504) is amended by adding at the end
5 the following:

6 “(q) USE OF MEDIATION.—

7 “(1) IN GENERAL.—A Federal natural resource
8 trustee, State natural resource trustee, or Indian
9 tribe seeking damages for injury to, destruction of,
10 or loss of a natural resource under subsection (a) or
11 (f) of section 107 shall initiate mediation of the
12 claim with any potentially responsible parties by
13 means of the mediation procedure or other alter-
14 native dispute resolution method recognized by the
15 United States district in court for the district which
16 the action is filed.

17 “(2) TIME.—Mediation shall be initiated not
18 later than 120 days after commencement of an ac-
19 tion for damages.”.

20 **SEC. 707. EFFECTIVE DATE AND TRANSITION RULE.**

21 The amendments made by this title shall not apply
22 to an action to recover natural resource damages under
23 section 107(f) in which trial has begun before July 1,
24 1997, or in which a judgment has become final before that
25 date.

1 **TITLE VIII—MISCELLANEOUS**

2 **SEC. 801. RESULT-ORIENTED CLEANUPS.**

3 (a) AMENDMENT.—Section 105(a) of the Com-
4 prehensive Environmental Response, Compensation, and
5 Liability Act of 1980 (42 U.S.C. 9605(a)) is amended—

6 (1) by striking “and” at the end of paragraph
7 (9);

8 (2) by striking the period at the end of para-
9 graph (10) and inserting “; and”; and

10 (3) by inserting after paragraph (10) the fol-
11 lowing:

12 “(11) procedures for conducting response ac-
13 tions, including facility evaluations, remedial inves-
14 tigations, feasibility studies, remedial action plans,
15 remedial designs, and remedial actions, which proce-
16 dures shall—

17 “(A) use a results-oriented approach to
18 minimize the time required to conduct response
19 measures and reduce the potential for exposure
20 to the hazardous substances, pollutants, and
21 contaminants in an efficient, timely, and cost-
22 effective manner;

23 “(B) require, at a minimum, expedited fa-
24 cility evaluations and risk assessments, timely
25 negotiation of response action goals, a single

1 engineering study, streamlined oversight of re-
2 sponse actions, and consultation with interested
3 parties throughout the response action process;

4 “(C) be subject to the requirements of sec-
5 tions 117, 120, 121, and 133 in the same man-
6 ner and to the same degree as those sections
7 apply to response actions; and

8 “(D) be required to be used for each reme-
9 dial action conducted under this Act unless the
10 Administrator determines that their use would
11 not be cost-effective or result in the selection of
12 a response action that achieves the goals of pro-
13 tecting human health and the environment stat-
14 ed in section 121(a)(1)(B).”.

15 (b) AMENDMENT OF NATIONAL HAZARDOUS SUB-
16 STANCE RESPONSE PLAN.—Not later than 180 days after
17 the date of enactment of this Act, the Administrator, after
18 notice and opportunity for public comment, shall amend
19 the National Hazardous Substance Response Plan under
20 section 105(a) of the Comprehensive Environmental Re-
21 sponse, Compensation, and Liability Act of 1980 (42
22 U.S.C. 9605(a)) to include the procedures required by the
23 amendment made by subsection (a).

1 **SEC. 802. NATIONAL PRIORITIES LIST.**

2 Section 105 of the Comprehensive Environmental Re-
3 sponse, Compensation, and Liability Act of 1980 (42
4 U.S.C. 9605) (as amended by section 407(a)(2)) is
5 amended by adding at the end the following:

6 “(i) NATIONAL PRIORITIES LIST.—

7 “(1) LIMITATION.—

8 “(A) IN GENERAL.—After the date of the
9 enactment of this subsection, the President may
10 add vessels and facilities to the National Prior-
11 ities List only in accordance with the following
12 schedule:

13 “(i) Not more than 30 vessels and fa-
14 cilities in 1997.

15 “(ii) Not more than 25 vessels and fa-
16 cilities in 1998.

17 “(iii) Not more than 20 vessels and
18 facilities in 1999.

19 “(iv) Not more than 15 vessels and
20 facilities in 2000.

21 “(v) Not more than 10 vessels and fa-
22 cilities in any year after 2000.

23 “(B) RELISTING.—The relisting of a vessel
24 or facility under section 130(d)(5)(C)(ii) shall
25 not be considered to be an addition to the Na-

1 tional Priorities List for purposes of this sub-
2 section.

3 “(2) PRIORITIZATION.—The Administrator
4 shall prioritize the vessels and facilities added under
5 paragraph (1) on a national basis in accordance with
6 the threat to human health and the environment
7 presented by each of the vessels and facilities, re-
8 spectively.

9 “(3) STATE CONCURRENCE.—A vessel or facil-
10 ity may be added to the National Priorities List
11 under paragraph (1) only with the concurrence of
12 the Governor of the State in which the vessel or fa-
13 cility is located.”.

14 **SEC. 803. OBLIGATIONS FROM THE FUND FOR RESPONSE**
15 **ACTIONS.**

16 Section 104(c)(1) of the Comprehensive Environ-
17 mental Response, Compensation, and Liability Act of
18 1980 (42 U.S.C. 9604(c)(1)) is amended—

19 (1) in subparagraph (C) by striking “consistent
20 with the remedial action to be taken” and inserting
21 “not inconsistent with any remedial action that has
22 been selected or is anticipated at the time of any re-
23 moval action at a facility.”;

24 (2) by striking “\$2,000,000” and inserting
25 “\$4,000,000”; and

1 (3) by striking “12 months” and inserting “2
2 years”.

3 **SEC. 804. TECHNICAL CORRECTIONS.**

4 (a) IN GENERAL.—Section 107(a) of the Comprehen-
5 sive Environmental Response Compensation, and Liability
6 Act of 1980 (42 U.S.C. 9607(a)) is amended—

7 (1) by inserting “IN GENERAL.—” after “(a)”;

8 (2) by striking “Notwithstanding” and insert-
9 ing the following:

10 “(1) PERSONS LIABLE.—Notwithstanding”;

11 (3) by redesignation paragraphs (1), (2), (3),
12 and (4) (as designated before the date of enactment
13 of this Act) as subparagraph (A), (B), (C), and (D),
14 respectively, and adjusting the margins appro-
15 priately;

16 (4) by striking “hazardous substance, shall be
17 liable for—” and inserting the following: “hazardous
18 substance;
19 shall be liable for the costs and damages described
20 in paragraph (2).

21 “(2) COSTS AND DAMAGES.—A person de-
22 scribed in paragraph (1) shall be liable for—”;

23 (5) by striking “The amounts” and inserting
24 the following:

25 “(3) INTEREST.—“The amounts”; and

1 (6) in the first sentence of paragraph (3) (as
2 designated by subparagraph (E)), by striking “sub-
3 paragraphs (A) through (D)” and inserting “para-
4 graph (2)”.

5 (b) CONFORMING AMENDMENTS.—Section 107 of the
6 Comprehensive Environmental Response, Compensation,
7 and Liability Act of 1980 (42 U.S.C. 9607) is amended—

8 (1) in subsection (d)(3), by striking “the provi-
9 sions of paragraph (1), (2), (3), or (4) of subsection
10 (a) of this section” and inserting “subsection (a)”;
11 and

12 (2) in subsection (f)(1), by striking “subpara-
13 graph (C) of subsection (a)” each place it appears
14 and inserting “subsection (a)(2)(C)”.

15 **TITLE IX—FUNDING**

16 **Subtitle A—General Provisions**

17 **SEC. 901. AUTHORIZATION OF APPROPRIATIONS FROM THE** 18 **FUND.**

19 Section 111(a) of the Comprehensive Environmental
20 Response, Compensation, and Liability Act of 1980 (42
21 U.S.C. 9611(a)) is amended in the first sentence by strik-
22 ing “not more than \$8,500,000,000 for the 5-year period
23 beginning on the date of enactment of the Superfund
24 Amendments and Reauthorization Act of 1986, and not
25 more than \$5,100,000,000 for the period commencing Oc-

1 tober 1, 1991, and ending September 30, 1994” and in-
2 serting “a total of \$8,500,000,000 for fiscal years 1998,
3 1999, 2000, 2001, and 2002”.

4 **SEC. 902. ORPHAN SHARE FUNDING.**

5 Section 111(a) of the Comprehensive Environmental
6 Response, Compensation, and Liability Act of 1980 (42
7 U.S.C. 9611(a)), as amended by section 301(c), is amend-
8 ed by inserting after paragraph (8) the following:

9 “(9) ORPHAN SHARE FUNDING.—Payment of
10 orphan shares under section 136.”.

11 **SEC. 903. DEPARTMENT OF HEALTH AND HUMAN SERV-**
12 **ICES.**

13 Section 111 of the Comprehensive Environmental Re-
14 sponse, Compensation, and Liability Act of 1980 (42
15 U.S.C. 9611) is amended by striking subsection (m) and
16 inserting the following:

17 “(m) HEALTH AUTHORITIES.—There are authorized
18 to be appropriated from the Fund to the Secretary of
19 Health and Human Services to be used for the purposes
20 of carrying out the activities described in subsection (e)(4)
21 and the activities described in section 104(i), \$50,000,000
22 for each of fiscal years 1998, 1999, 2000, 2001, and 2002.
23 Funds appropriated under this subsection for a fiscal year,
24 but not obligated by the end of the fiscal year, shall be
25 returned to the Fund.”.

1 **SEC. 904. LIMITATIONS ON RESEARCH, DEVELOPMENT,**
2 **AND DEMONSTRATION PROGRAMS.**

3 Section 111 of the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of 1980 (42
5 U.S.C. 9611) is amended by striking subsection (n) and
6 inserting the following:

7 “(n) LIMITATIONS ON RESEARCH, DEVELOPMENT,
8 AND DEMONSTRATION PROGRAMS.—

9 “(1) ALTERNATIVE OR INNOVATIVE TECH-
10 NOLOGIES RESEARCH, DEVELOPMENT, AND DEM-
11 ONSTRATION PROGRAMS.—

12 “(A) LIMITATION.—For each of fiscal
13 years 1998, 1999, 2000, 2001, and 2002, not
14 more than \$30,000,000 of the amounts avail-
15 able in the Fund may be used for the purposes
16 of carrying out the applied research, develop-
17 ment, and demonstration program for alter-
18 native or innovative technologies and training
19 program authorized under section 311(b) other
20 than basic research.

21 “(B) CONTINUING AVAILABILITY.—Such
22 amounts shall remain available until expended.

23 “(2) HAZARDOUS SUBSTANCE RESEARCH, DEM-
24 ONSTRATION, AND TRAINING.—

25 “(A) LIMITATION.—From the amounts
26 available in the Fund, not more than the follow-

1 ing amounts may be used for the purposes of
2 section 311(a):

3 “(i) For fiscal year 1998,
4 \$37,000,000.

5 “(ii) For fiscal year 1999,
6 \$39,000,000.

7 “(iii) For fiscal year 2000,
8 \$41,000,000.

9 “(iv) For each of fiscal years 2001
10 and 2002, \$43,000,000.

11 “(B) FURTHER LIMITATION.—No more
12 than 15 percent of such amounts shall be used
13 for training under section 311(a) for any fiscal
14 year.

15 “(3) UNIVERSITY HAZARDOUS SUBSTANCE RE-
16 SEARCH CENTERS.—For each of fiscal years 1998,
17 1999, 2000, 2001, and 2002, not more than
18 \$5,000,000 of the amounts available in the Fund
19 may be used for the purposes of section 311(d).”.

20 **SEC. 905. AUTHORIZATION OF APPROPRIATIONS FROM**
21 **GENERAL REVENUES.**

22 Section 111(p) of the Comprehensive Environmental
23 Response, Compensation, and Liability Act of 1980 (42
24 U.S.C. 9611(p)) is amended by striking paragraph (1) and
25 inserting the following:

1 “(1) AUTHORIZATION OF APPROPRIATIONS.—

2 “(A) IN GENERAL.—There are authorized
3 to be appropriated, out of any money in the
4 Treasury not otherwise appropriated, to the
5 Hazardous Substance Superfund—

6 “(i) for fiscal year 1998,
7 \$250,000,000;

8 “(ii) for fiscal year 1999,
9 \$250,000,000;

10 “(iii) for fiscal year 2000,
11 \$250,000,000;

12 “(iv) for fiscal year 2001,
13 \$250,000,000; and

14 “(v) for fiscal year 2002,
15 \$250,000,000.

16 “(B) ADDITIONAL AMOUNTS.—There is
17 authorized to be appropriated to the Hazardous
18 Substance Superfund for each such fiscal year
19 an amount, in addition to the amount author-
20 ized by subparagraph (A), equal to so much of
21 the aggregate amount authorized to be appro-
22 priated under this subsection and section
23 9507(b) of the Internal Revenue Code of 1986
24 as has not been appropriated before the begin-
25 ning of the fiscal year.”.

1 **SEC. 906. ADDITIONAL LIMITATIONS.**

2 Section 111 of the Comprehensive Environmental Re-
 3 sponse, Compensation, and Liability Act of 1980 (42
 4 U.S.C. 9611) (as amended by section 102(c)) is amended
 5 by adding at the end the following:

6 “(t) **COMMUNITY RESPONSE ORGANIZATION.**—For
 7 the period commencing January 1, 1997, and ending Sep-
 8 tember 30, 2002, not more than \$15,000,000 of the
 9 amounts available in the Fund may be used to make
 10 grants under section 117(f) (relating to Community Re-
 11 sponse Organizations).

12 “(u) **RECOVERIES.**—Effective beginning January 1,
 13 1997, any response cost recoveries collected by the United
 14 States under this Act shall be credited as offsetting collec-
 15 tions to the Superfund appropriations account.”.

16 **SEC. 907. REIMBURSEMENT OF POTENTIALLY RESPON-**
 17 **SIBLE PARTIES.**

18 Section 111(a) of the Comprehensive Environmental
 19 Response, Compensation, and Liability Act of 1980 (42
 20 U.S.C. 9611(a)) (as amended by section 902) is amended
 21 by inserting after paragraph (9) the following:

22 “(10) **REIMBURSEMENT OF POTENTIALLY RE-**
 23 **SPONSIBLE PARTIES.**—If—

24 “(A) a potentially responsible party and
 25 the Administrator enter into a settlement under
 26 this Act under which the Administrator is reim-

1 bursed for the response costs of the Adminis-
2 trator; and

3 “(B) the Administrator determines,
4 through a Federal audit of response costs, that
5 the costs for which the Administrator is reim-
6 bursed—

7 “(i) are unallowable due to contractor
8 fraud;

9 “(ii) are unallowable under the Fed-
10 eral Acquisition Regulation; or

11 “(iii) should be adjusted due to rou-
12 tine contract and Environmental Protec-
13 tion Agency response cost audit proce-
14 dures,

15 a potentially responsible party may be reimbursed
16 for those costs.”.